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Supreme Court of the United States

OCTOBER TERM, 1914.

~~No. 1129.~~

EPHRAIM SIMON, Apellant,

versus

THE SOUTHERN RAILWAY COMPANY, Appellee.

Brief on Behalf of the Southern Railway Company, Defendant, Appellee.

J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors for Appellee.

ALFRED P. THOM,
Of Counsel.

New Orleans, October, 1914.

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SYLLABUS.

I. When diversity of citizenship exists and the amount involved exceeds three thousand dollars, a Federal Court can afford a litigant the same measure of protection which the State Court offers.

II. In aid of jurisdiction thus invoked, the Federal Court may issue conservatory process of injunction, just as a State Court may utilize that writ.
Terre Haute vs. Peoria, 82 Fed. 945.

III. When a default judgment, final and finished in the Court which rendered it, has been rendered in a State Court, which judgment is void for want of citation of defendant, or because obtained by fraud, or inequitably obtained because of some accident or mistake not attributable to his negligence, defendant was prevented from properly defending it, equiiy wiill by injunction restrain the plaintiiff personally from seeking to avail himself of his unfair advantage.

17 Howard 445, 94 U. S. 653; 104 U. S. 93; 107 U. S. 11; 133 U. S. 152; 98 U. S. 61; 141 U. S. 496; Marine Insurance Company vs. Hodgson, 17 Cranch 332; Johnson vs. Waters, 111 U. S. 667; Cole vs. Cunningham, 133 U. S. 112.

IV. In such case, if diverse citizenship exists and three thousand dollars are in controversy, the Federal Courts, as well as the State Courts, may issue the process.

Marshall vs. Holmes, 141 U. S. 496; Gaines vs. Fuentes, 82 U. S. 10; Arrowsmith vs. Gleason, 129 U. S. 98; Old Wayne Association vs. McDonough, 204 U. S. 15; National Surety Company vs. State Bank, 120 Fed. 593.

V. Nor is there anything in U. S. Revised Statutes 720, to prevent it, since the proceeding is an independent proceeding whether it be brought in the State or the Federal Court, and no State Court having assumed jurisdiction of it, the Federal Court interferes with no State Court in taking it up.

National Surety Company vs. State Bank, 120 Fed. 593; Julian vs. Central Trust Company, 193 U. S. 112; Marshall vs. Holmes, 141 U. S. 496; Gaines vs. Fuentes, 92 U. S. 10.

VI. It was conceded at the bar in the lower Court that this action as brought could have been brought in the State Court. This being so, and diverse citizenship existing, no valid reason can be given why it should not be brought in the Federal Court. (Judge Parlange's statement of Concession, Transcript p. 12).

VII. The fact that the State statute confines certain actions to certain specified State Courts will not prevent the proper Federal Courts from entertaining same, provided the other jurisdictional prerequisites exist, for a State statute cannot in any wise abridge or impair the scope of the jurisdiction of the Federal Courts.

Hydes vs. Stone, 20 Howard 170-175; Mississippi Mills vs. Cohn, 150 U. S. 202.

VIII. The judgment obtained by Simon in the State Court was based on a pretended citation served on the Assistant Secretary of State of Louisiana. That official pigeonholed the papers and the defendant had no knowledge of the proceedings until after judgment was rendered. (Transcript p. 14, p. 18, p. 65, p. 66, p. 197).

IX. Such a citation was no citation at all because the Act of Louisiana (Act 54 of 1904) under which it was suposed to have been made requires service on the Secretary of State, not on the Assistant Secretary, and such statutes are required to be rigidly construed.

Lonkey vs. Keyes Silver Mining Co., 17 L. R. A. 352; Watertown vs. Robinson, 69 Wis. 233; Amy vs. Watertown, 130 U. S. 302; Alexandria vs. Fairfax, 95 U. S. 780; Settlement vs. Sullivan, 97 U. S. 447; Gage vs. Trust

Company, 156 Fed., 1004; Swarts vs. Stock Company, 166 Fed. 343; King vs. Davis, 137 Fed. 206.

X. A State law authorizing service of process directed to foreign corporations in suits **in personam** on the Secretary of State and authorizing that official to pigeonhole same, the effect of which is that the foreign corporation receives no notice of same, does not constitute due process of law, and violates the Federal Constitution.

Wayne vs. McDonough, 204 U. S. 17; Gouner vs. Missouri Valley Bridge & Iron Co., 123 La. 964, 49 So. 657; Scott vs. McNeil, 154 U. S. 46; Lafayette Insurance Co. vs. French, 18 Howard 470; St. Clair vs. Cox, 106 U. S. 356; Lasere vs. Rocherau, 17 Wallace 437; Twining vs. N. J., 211 U. S. 110.

XI. An interstate railroad which owns no rails and operates no trains in the State will not be held to be doing business in such State because it has therein two agents, one exclusively employed in soliciting passenger business and one exclusively employed in soliciting freight business.

Green vs. Chicago, Burlington & Quincy Railway, 205 U. S., 530; Peterson vs. C. R. I. & P. Ry., 205 U. S. 390; Maxwell vs. Atchison Ry. 34 Fed. 286; Earle vs. C. & O. Ry. Co., 127 Fed. 235; Union Associated Press vs. Times-Star Company, 84 Fed. 419; Fairbanks vs. C. N. O. & T. P. R. R., 54 Fed. 421; Wall vs. Railroad, 95 Fed., 399; Maguire vs. Great Northern Railroad Company, 155 Fed. 231; West vs. C. N. O. & T. P. R. R., 170 Fed. 355; Miller vs. Pennsylvania R. R. Co, 113 Fed. 506.

XII. The fact that an interstate initial carrier furnishes and causes to be sold through interstate tickets to points on the lines of its connecting carriers, does not make those connecting carriers, whose lines are without the initial State, amenable to process within that State on the ground that they are doing business therein.

Maxwell vs. Atchison Railroad, 34 Fed. 286; Earle vs. C. & O. 127 Fed. 235; Green vs. C. B. & Q. Railroad Co., 205 U. S. 530; Daly vs. Railroad Co., 8 Abbott (Pr. New York) 427; St. Louis Insurance Co. vs. Railroad Co., 104 U. S. 146; Allen vs. Yellowstone Park Transportation Co., 154 Fed. 507; Goepfert vs. Compagnie Generale Transatlantique, 156 Fed. 198.

XIII. Mere ownership of stock in a corporation which is doing business in a State does not constitute a doing of business in that State by the owner so as to subject him to process there.

Peterson vs. C. R. I. & P. Railroad Co., 205 U. S., 390; Earle vs. C. & O. Railroad, 127 Fed., 235; Standard Oil Company, 101 Pa. State, 119.

XIV. The single act of leasing the right to use in the future real property located in a State, unaccompanied by user of any kind, does not constitute doing business in a State so as to subject the lessee to process in the said State.

Cooper vs. Ferguson, 113 U. S., 727; Hunter vs. Mutual Reserve Life Ins. Co. 218 U. S. 573; Empire Milling Co. vs Tombstone Mill & Mining Co., 100 Fed. 910; Bruner vs. Kansas Moline Plow Co., 168 Fed 220; Metal Co. vs. Mining Co., 152 Fed., 1008; Gilchrist vs. Helene Railroad Co., 47 Fed. 598.

XV. When a corporation of one State goes into another State and transacts business in defiance of its statute as to service of process, it will, in an action against it in such State, be held to have assented to the terms validly prescribed by the local statute for service of process in respect to business done in that State, but its assent in that regard will not be inpiled only as to business transacted in that State.

Old Wayne vs. McDonough, 204 U. S., 8; 68 Nebr. 920; 49 Fed. 910; Central Railway vs. Carr, 76 Ala., 388; Robbins vs. Oceanic, 112 N. Y. 315; Osler vs. Buffalo, 130 Fed. 1017; Newell vs. Great Western Railroad Co., 19 Mich. 336.

XVI. A judgment rendered without citation is not, as between the parties **res adjudicata** on the question of citation **vel non.**

Old Wayne vs. McDonough, 204 U. S. 15; Cole vs. Cunningham, 133 U. S. 112; Scott vs. McNeal, 154 U. S. 45; Michigan Trust Co. vs. Terry, 175 Fed. 669.

XVII. The conduct of the defendant herein in obtaining the judgment which Simon obtained in the State Court, amounted to a fraud upon the Southern Railroad Company.

May It Please the Court:

The contentions made by Ephraim Simon, appellant in this case, have already been passed upon adversely by the Special Master, by three different U. S. District Judges, namely, Judges Parlange, Saunders and Foster, and by the three Judges of the Circuit Court of Appeals for the Fifth Circuit, namely Judges Pardee, Shelby and Maxey. His contention on the subject of jurisdiction has even been decided against him by this Court (208 U. S., 4). Notwithstanding all this, he is here. The facts are as follows:

PRELIMINARY.

After reading appellant's fourth assignment to the Circuit Court of Appeals at record p. 301 and pages 22 and 23 of appellant's brief, we are at a loss to discover what right he has to an appeal to this Court. If the statements there made by him be correct, and if it be a fact that complainant relies only upon fraud, accident and mistake and the fact that it was not doing business in Louisiana, and raises no constitutional questions in its bill, then the jurisdiction of the Circuit Court must have been invoked on grounds of diverse citizenship solely. If, however, that is the case, then the judgment of the Circuit Court of Appeals is final and the present appeal must be dismissed.

181 U. S. 277, American Sugar Refining Co. vs. New Orleans;

187 U. S. 585, Ayers vs. Polsdorfer.

I.

FACTS.

The appellant, Ephraim Simon,—a citizen of Louisiana (Tr., p. 8), had his ankle slightly strained while traveling on a train of the Southern Railway Company. The accident occurred at York, in the State of Alabama (Tr., p. 9). The Southern Railway Company is a Virginia corporation, as Simon himself admits (Tr., p. 9).

After the accident, the railway surgeon examined Simon and pronounced his injuries inconsiderable. By way of compromise, Simon was offered $350.00. He originally claimed but $5000.00, spoke of accepting $750.00, and as the railroad company would not offer that much, Simon withdrew, as the railroad thought, to think the matter over and report back to the railroad.

Instead of so doing, he surreptitiously went into the State Court in New Orleans, made a so-called service of a petition on the Southern Railway Co. through the **Assistant** Secretary of State of Louisiana, inflated his demand up to $13,348.00, impaneled a jury, and unbeknown to the railroad company obtained a default judgment against it for $13,348.00.

In the New Orleans Court in which this judgment was obtained, it is an universal custom to have the testimony transcribed stenographically, and, under the law, an appeal may be had **ON THE FACTS** as well as the law to the Supreme Court of the State. In the present instance, this invariable custom, at Simon's suggestioin, was disregarded. The testimony was **not** taken stenographic-

ally. In this way, the railroad company was deliberately deprived of any possible opportunity of obtaining any effective review of the judgment. One naturally inquires why was this precaution taken?

The alleged citation made on the Assistant Secretary of State was pigeon-holed by that official in his office, under general instructions to that effect from the Attorney-General of Louisiana (T., p. 18). No attempt was made to notify the Southern Railway Co. of its receipt. The Southern Railway Company had absolutely no knowledge of the suit either actual or constructive until after the judgment was rendered. Promptly on being advised of the suit, that company employed counsel and sued out the injunction now before your Honors, restraining **Ephraim Simon** from executing the judgment so peculiarly obtained.

Judge Charles Parlange, then U. S. District Judge for the Eastern District of Louisiana, caused a rule nisi to issue, and, after a hearing on the same, granted a preliminary injunction (Tr., pp. 85, 86 and 87).

Simon then filed, successively, a demurrer and a plea to the jurisdiction (Tr., pp. 93 and 97), and both having been overruled, he filed answer (Tr., p. 99).

THEREAFTER SIMON DELIBERATELY AND IN COLD BLOOD VIOLATED THE INJUNCTION BY CAUSING EXECUTION TO ISSUE ON HIS JUDGMENT.

The facts in connection with this defiance of the mandate of the U. S. District Court are fully set forth in complainant's rule for contempt (Tr., p. 109).

By that rule, complainant cited Simon to show cause why he should not be committed for contempt. The rule was heard (Tr., p. 108), and Judge E. D. Saunders (who meantime had succeeded Judge Parlange) fined Simon for contempt, and ordered that:

> "He stand committed to be imprisoned in the Parish Prison until his fine is paid" (Tr., p. 130).

Simon refused to pay the fine, went to prison, and applied to this Court for a writ of **habaes corpus.** This court issued the preliminary writ of **habeas corpus,** took the record up (Tr., p. 141), and, having examined it, denied Simon the relief asked for and thereby affirmed the commitment for contempt. See **Ex Parte Simon, 208 U. S., 144.**

Thereafter, the cause was heard on its merits before the Honorable Charles F. Buck, whom Judge Parlange had appointed Special Master in the matter by an order reading as follows:

> "The Court hereby appoints the Honorable Charles F. Buck to be special master in chancery in this case, with all powers possessed by masters in chancery. This cause is now referred to him and he is specially authorized and directed to hear and take all testimony and evidence in this cause and to report the same to this Court, together with his findings of law and fact, and of any and all matters which may come before him in this cause.
>
> "(Signed) **Chas. Parlange, U. S. Judge.**
>
> "New Orleans, La., June 10th, 1905."

What happened before the Special Master is thus stated by that official (Tr., pp. 154-155):

> "The case was fixed for hearing by consent for Thursday, July 10th, 1908, before the Master.
>
> "**Harry H. Hall, Esq.**, for Complainant.
>
> "**Henry L. Lazurus**, for Defendant.
>
> "Dr. Denegre Martin and Harry H. Hall, Esq., testified on behalf of complainant.
>
> "Solicitors for complainant offered certain documentary evidence duly identified, and further hearing was adjourned, subject to notification of the Master or agreement of the parties, all as per exhibit marked:
>
> " 'Testimony taken before the Master on behalf of the complainant, filed Saturday, April 16th, 1909, returned with this report.
>
> "(Signed) **Charles F. Buck**, Special Master.
>
> "The hearing was resumed January 7th, 1909, the testimony of Larz. A. Jones was taken on behalf of defendant. Both parties were present by their solicitors. The documentary evidence offered was duly identified and filed, as per Exhibit marked: 'Testimony for Defendant, filed April 16th, 1909.' "

After the hearing thus had the **SPECIAL MASTER FILED HIS REPORT** (Tr., p. 148 to 176), in which, after going over the entire ground, he found that the judgment obtained by **Simon** in the State Court **WAS HAD WITHOUT CITATION** of the defendant, and as such, was an absolute nullity.

To this report, defendant, Simon, took many exceptions. Among others was an exception to the order ap-

pointing the Master. So far as this record shows this exception was the first objection of any kind made by Simon to the appointment of the Master, or to the powers vested in that official. On the contrary, on page 277 of the transcript Simon through his counsel entered into an agreement relative to the exceptions to be filed to the Master's report. Simon, therefore, has placed himself in the unenviable light of one who takes advantage of the appointment of a Master, offers his evidence and argument before him, all with the full knowledge of the order appointing the Master, and only when the Master decides against his contentions, does he discover any informality in the appointment.

Under such circumstances, Simon is surely estopped to contest in any manner, the validity of the order of reference quoted **supra**. Of this, more **anon**, although it may be said to be a moot question, since all that Simon claimed in the Court below was that the Master should have reported the proceedings had before him to the Judge, who should consider them fully himself, and since the Judge **a quo**, Judge Foster, did so fully consider them, as appears by his ruling (Tr., p. 295), which reads as follows:

> "The defendant has excepted to the Master's report as a whole, and specially both as to his conclusions of law and findings of fact.
>
> "It is contended by complainant that defendant by not having objected to the taking of the evidence before the Master, has consented to his appointment, and is now estopped to controvert his findings of fact.

"I do not agree with this contention. The Court could not, except by consent of all parties, abdicate its duty to determine, by its own judgment, the facts and the law applicable to them. The report of the Master is merely advisory to the Court, and while entitled to great weight on findings of fact deduced from conflicting testimony, where the Master has had opportunity to form his own opinion as to the truthfulness of the witnesses, the Court may weigh the evidence and find its own facts, and, indeed, it is the Court's duty to do so whenever either side excepts to the report of the Master. **In this case, I consider the entire matter is before me for decision.**"

Under this ruling, the defendant received at the hands of the Court below, precisely the treatment which he claimed that he was entitled to receive, and which he would have received had the Master not reported, but simply transmitted the documents and evidence to the Court. Therefore, as we remarked above, the question of the validity of the order appointing and empowering the Master is one of academic interest merely. In this connection it may not be amiss to point out the inconsistency of which appellant is guilty when, after assailing the appointment of the Master at record p. 278 and brief p. 7, he volt faces at brief p. 72 and relies upon certain findings of the Master.

Thereafter, the Judge **a quo**, Judge Foster, who had, meantime, succeeded the original Judge (Parlange), and the intermediate Judge (Saunders), when the matter was heard before him on the merits, handed down a written opinion. In it he sustained the complainant's

contention that there was no citation of the defendant railway company in Simon's original suit and held (Tr., p. 297):

> "That the judgment of the Civil District Court was rendered without due process of law, and is, therefore, null and void."

He further held, that since the judgment was null and void, it was useless for him to pass upon the other questions in the record (Tr., p. 297), and he made the injunction perpetual (Tr., p. 298). From this judgment Simon prosecuted an appeal to the Circuit Court of Appeals, Fifth Circuit, where the case was fully argued before Judges Pardee, Shelby and Maxey (T., p. 309), and again decided against Simon, as appears by their opinion at page 309, and decree (T., p. 313), affirming the judgment of the District Court. A rehearing having been refused, Simon appealed to this Court, assigning some eighteen errors. It is this appeal which is presently at bar. We shall discuss these assignments seriatim.

II.

ASSIGNMENT NO. 1.

The Circuit Court of Appeals say, in their opinion (T., p. 310):

> "That the Circuit Court had jurisdiction of the suit has been authoritatively decided in **Ex Parte Simon, 208 U. S. 144**; see also **Gaines vs.**

> **Fuentes, 92 U. S. 10; Marshall vs. Holmes, 141 U. S. 589,** and authorities therein cited. That decision is binding upon this Court until reversed or modified by the Supreme Court."

This finding is the subject of Simon's first assignment, he contending that the Circuit Court of Appeals erred in holding that this Court authoritatively decided in **Ex Parte Simon, 208 U. S. 144,** that the Circuit Court had jurisdiction of this case.

Reference to the opinion in **Ex Parte Simon** shows that this court, speaking through Mr. Justice Holmes, said:

> "The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally, unless we overrule the strong intimations in **Marshall vs. Holmes, 141 U. S. 589,** and the earlier cases cited in that case. Even if the decision could have been put upon a narrower ground, the ground adopted was that the Circuit Court had original jurisdiction of such a suit."

This language seems to dispose of Assignment No. 1, especially when we consider the circumstances under which it was used. They were that Simon, after being enjoined by the District Court in this proceeding, violated the injunction and was incarcerated for contempt. He appealed to this Court for relief by habeas corpus, on the ground that the District Court was without jurisdiction to enjoin him; hence, without jurisdiction to jail him. The jurisdictional issue was **the vital one in that proceeding,** the crux upon which the whole proceeding hung. In deciding that issue this Court used the lan-

guage above quoted and refused to liberate Simon. It thereby necessarily affirmed the jurisdiction of the Circuit Court to try the cause. That it was correct in so holding the discussion of the next assignments will demonstrate.

ASSIGNMENTS II, III, IV, V, VII, X, XI, XII, XIV, XV, XVI.

All of these assignments either directly or indirectly seek to raise the point that the Circuit Court had no jurisdiction to entertain the bill. As stated above, we believe that this Court has already decided this point against Simon.

Before considering further the legal aspect of this question, let us get clearly before us the history of the many occasions in which the point has been decided against Simon already in these proceedings.

The facts are that the Southern Railway Company, a Virginia Corporation, invoked the jurisdiction of the United States Circuit Court, **praying that tribunal to enjoin Simon**, a citizen of Louisiana, from executing a judgment obtained by him against it. The reasons alleged why Simon should be enjoined from executing his judgment are:

1: Because it was obtained without citation on the defendant.

2: Because it was obtained fraudulently.

Simon questioned the jurisdiction of the Circuit Court. This Court being called upon to review a ruling of the Circuit Court affirming that jurisdiction, said:

Ex Parte. Simon, 208 U. S. 148:

> "The Circuit Court has jurisdiction of the case. That must be assumed at this stage **and finally**, unless we overrule the strong intimation in **Marshall vs. Holmes, 141 U. S. 589**, and the earlier cases cited in that case. Even if the decision could have been put upon narrower ground, the ground adopted was that the Circuit Court had original jurisdiction of such a suit."

Dealing with the case at bar, and deciding this particular point, U. S. District Judge Parlange said (Tr., p. 85):

> "The main contention on behalf of the defendant is that this Court is precluded from issuing an injunction in this case, because of the prohibition of Section 720 of the Revised Statutes, etc
>
> "It is thoroughly settled that the Statute just mentioned has no aplication to such a cause as the instant one. See **Massie et al vs. Buck, 128 Fed. Rep. 27**, settling the question in this Circuit. See authorities cited in that case. See **National Surety Co. etc. vs. State Bank, etc. (C. C. A. 8th Circuit), 120 Fed. Rep. 593; Terre Haute, etc., Co. vs. Peoria, etc., Co. 82 Fed. 943; Garner vs. Second Natl. Bank, etc. (C. C. A. 1st Circuit), 67 Fed Rep. 833. Circuit Judge, McCormick, in Central Trust Co. vs. St. Louis, etc., Co., 59 Fed. 386; Julian vs. Central Trust Co., 193 U. S. 112**, and other cases.

"Section 720, Revised Statutes, applies only to cases where the jurisdiction of the State Court has attached first. Justice Field, in **Sharon vs. Terry, 36 Fed. Rep. 365**; Justice McKenna in **President, etc., Co. vs. Merritt, et al., 59 Fed. Rep. 7; Laning vs. Osborne, 79 Fed. Rep. 662**, and other cases. Notice, **Whitney vs. Wilder (C. C. A. 5th, Circuit), 54 Fed. Rep. 554.**

"In the Federal Courts, a trial Judge, in such a cause as the instant one, has the right in the exercise of a sound discretion to issue a preliminary injunction in order to preserve the status quo until the final termination of the cause. Circuit Judge Shelby in **Massie vs. Buck, supra; Railroad Commission, etc. vs. Rosenbaum, etc., vs. Harriman, 134 Fed. Rep. 331; Kerr vs. N. O., 126 Fed. Rep. 924.**

"The meaning of Section 720, Revised Statutes is perfectly plain. The Statute was intended only to prohibit the Federal Courts from attempting to act as Courts of Review over the State Courts. But Congress never intended that the Federal Courts in matters over which they have jurisdiction, should be deprived of any power of injunction necessary for the assertion and maintenance of that jurisdiction. The Federal Courts would be infirm and impotent indeed if when cases are brought to them which they are competent to decide they could not afford the ancillary protection without which the relief sought in the causes could not be given. In such cases the Federal Courts certainly have the same power that the State Courts would have if the causes were brought to them.

"IT WAS CONCEDED IN THE ARGUMENT, AND THE MATTER IS OBVIOUS WITH-

OUT THE CONCESSION, THAT THE COMPLAINANT IN THIS CAUSE COULD HAVE BROUGHT THIS ACTION IN THE STATE COURTS, COUPLING THEREWITH A PRAYER FOR AN INJUNCTION. This being unquestionably true, why cannot the complainant, being a citizen of another State, apply to this Court and obtain from it the same remedies which the State Court would grant it?

"The present action was brought first to this Court. That action is not now pending in the State Court and has never been in that Court.

"The matter is so clear that further discussion of it would be futile."

(Notice that the case of **National Surety Co., etc. vs. State Bank, etc. [C. C. A. 8th Circuit], 120 Fed. Rep. 593**—cited **supra**—is very similar to the instant case.)

U. S. District Judge Saunders was then called on to pass upon the question, which he did by upholding the jurisdiction of his Court to grant the injunction and committing Simon for contempt.

U. S. District Judge Foster then had the case before him, and decided it as follows (Tr., p. 284):

"In this case the complainant, the Southern Railway Company, seeks an injunction to restrain the defendant, Ephraim Simon, from executing a certain judgment of the Civil District Court for the Parish of Orleans, on the ground that the said judgment is null and void for want of citation. A demurrer attacking the jurisdiction of this Court to issue the injunction was overruled by my predecessor, the Hon. Charles Parlange,

> and the jurisdiction of this Court was also maintained by my predecessor, the Hon. Eugene D. Saunders. (See also, **Ex parte Simon, 208 U. S. 144.**)
>
> "From a careful consideration of the law as I understand it, I agree with them and cannot add to the reasons they assign."

The Circuit Court of Appeals, Fifth Circuit, then had the case before it and decided (Tr., p. 310) that this Court had held that the Circuit Court had jurisdiction.

Judge Shelby of the Circuit Court of Appeals, Fifth Circuit, had had a similar jurisdictional point before him in **128 Fed. Rep. 27, Massie vs. Buck,** and decided it in the same way.

Judge McCormick of the Circuit Court of Appeals, Fifth Circuit, long before had reached the same conclusion in a somewhat similar case. **55 Federal, 386.**

Mr. Justice McKenna had a similar point before him in **59 F., 7,** and decided it in the same way.

When a particular point in a certain case has been passed upon by the Supreme Court of the United States, by the Circuit Court of Appeals and by three different United States District Judges and when similar points in other cases have been passed upon by the Judges of the United States Circuit Court of Appeals of the same Circuit, **and all have reached the same conclusion,** it might fairly be presumed that that particular issue was settled, but as appellant is again arguing it here, we shall again marshall these veteran authorities which have so often prevailed.

II a.

"THE UNITED STATES CIRCUIT COURT HAS JURISDICTION OF A SUIT BETWEEN CITIZENS OF DIFFERENT STATES, CLAIMING THAT THE JUDGMENT OBTAINED BY ONE AGAINST THE OTHER IN A STATE COURT IS NULL FOR WANT OF CITATION."

That is, it may determine, as between the Southern Railway Company, and Simon, whether the judgment of the State Court was, or was not absolutely void for want of citation in that Court. The issue presented is not whether complainant has the right to control or direct proceedings presently being carried on in a State Court properly seized of jurisdiction, and to arrogate to itself the power to determine those living, moving issues. But the issue raised is whether the Federal Court, vested with jurisdiction by reason of diverse citizenship, has the power to sit in judgment upon the terminated act of the State Court and decide whether or not that action is null and void in so far as it concerns the parties thereto.

In the present case, as the parties are citizens of different States any controversy whatever that may arise between them involving over $3000 is subject to the jurisdiction of a proper Federal Court if the parties invoke that jurisdiction.

The Southern Railway Company seeks to enjoin Simon from in any manner interfering with its property. Simon comes in and asserts the existence of a right in him, under an alleged judgment of the State Court, to seize and sell complainant's property.

The Southern Railway Company sets up that the judgment relied on by Simon was rendered without citation of the defendant, and that therefore Simon should be enjoined from executing it.

The authorities sustaining the Federal Court's jurisdiction are so numerous and uniform that the question should not be considered open to discussion.

In Marshall vs .Holmes, 141 U. S., 596, the Supreme Court says:

> "While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by Courts of Law over their judgments, a Court of the United States, sitting in equity, will not assume to control such judgment for the purpose simply of giving a new trial, it is a settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of Law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justiify an application to a Court of Chancery, **(Citing 7 Cranch 332, 336; 17 Howard 443, 445; 94 U. S. 652, 653; 104 U. S. 93, 96; 107 U. S. 3, 11; 133 U. S. 152, 154; 98 U. S. 61, 65).**
>
> "But it is contended that it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of the judgment at law, and that Mrs. Marshall could obtain the relief asked, only in the Court in which the judgments at law were rendered. Is it

true that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may not, in any case, deprive a party of the benefit of a judgmennt fraudulently obtained by him in a State Court, the circumstances being such as will authorize relief by the Federal Court, if the judgment has been rendered by it and not by a State Court? * * *

"This Court held that the jurisdiction of the Circuit Court depended upon the question whether the action to annul the judgment was or was not in its nature a separate suit, or only a supplementary proceeding so connected with the original suit as to form an incident to it, and to be substantially a continuation of it. *****

"It is said: 'If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Courts could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings of the State Courts, or would have appellate jurisdiction over them in a case where the parties are citizens of different States. Such a result would be totally impossible. On the other hand, if the proceedings are tantamount to a bill of equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in Gaines vs. Fuentes, 92 U. S. 10, the case might be within the jurisdiction of the Federal Courts, The distinction between the two

classes of cases might be somewhat nice, but it may be affirmed to exist. *****

"Referring to the provisions of the Louisiana Code of Practice, authorizing an action to annul a judgment obtained through fraud, forgery, the forgoing of documents, etc., the Court said that it was not disposed to allow the fact that by the local law, an action of nullity, could only be brought in the Court rendering the judgment, or in the Court to which the judgment was taken by appeal, to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States.

" 'If,' the Court said: 'The State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those Courts.'****

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is, none the less, an original, independent suit, because it relates to judgments obtained in the Courts of another jurisdiction. While it cannot require the State Court itself to set aside or vacate the judgment in question, it may, **as between the parties before it**, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantages obtained, by his judgments. **A DECREE TO THAT EFFECT WOULD OPERATE DIRECTLY UPON HIM, AND WOULD NOT CONTRAVENE THAT PROVISION OF THE STATUTE PROHIBITING A COURT OF THE UNITED STATES FROM GRANTING A**

WRIT OF INJUNCTION TO STAY PROCEEDINGS IN A STATE COURT. 'It would simply take from him the benefit of judgments obtained by fraud.'" (P. 596.)

91 U. S., 507, Earle vs. McVeigh:

In this case certain persons had obtained in the State Court judgments against McVeigh predicated upon service of process by posting on his former residence. They sought under them to seize and sell certain of his real estate. The United States Circuit Court made perpetual an injunction prohibiting the sale on the ground that the judgments were rendered without citation. The Court said:

> "Argument to show that no person can be bound by a judgment or any proceeding conducive thereto to which he was never a party or privy is quite unnecessary as no person can be considered in default with respect to that which it never was incumbent upon him to fulfill. Standard authorities lay down the rule that in order to give any binding effect to a judgment it is essential that the Court should have jurisdiction of the person and the subject matter, and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be inforced or where any benefit is claimed under it as the want of jurisdiction makes it utterly void and unanswerable for any purpose.

Since, in this case the Southern Railway Co. is seeking to enjoin Simon from seizing its property under a judgment rendered without citation, it can readily be

seen that the **EARLE McVEIGH CASE IS PRACTICALLY ON ALL FOURS WITH THE CASE AT BAR.**

In **National Surety Company of New York, et als., vs. State Bank, etc., 120 Federal Reporter, 593, et seq.,** the Court held (decided in 1903 Circuit Court of Appeals, Eighth Circuit)::

> "The gravamen of this bill, however, is not that there was no service of the summons in the action at law. It is that, in that action, a judgment which ought not, in equity and good conscience, to be paid, has been rendered against the surety company, when it had a perfect right of action, of which it was prevented from availing itself, by accident or mistake, without fault or negligence on its part. It is conceded that the judgment was regularly and legally rendered after due service of the summons. Yet the fact remains that it is a judgment without cause, which the appellants ought not to be required to pay, and which they were prevented from defending themselves against **by the failure of John F. Cornell, the auditor of public accounts of the State of Nebraska, to send them the summons, as the Statute directed.**" (Page 596.)
>
> "We have, then, an unconscionable judgment at law for seven thousand eight hundred and forty-two dollars and forty cents ($7,842.40) in favor of a citizen of Nebraska, to which the appellants, citizens of New York and Missouri, respectively, had a good defense, which they were prevented, by unavoidable accident, unmixed with fault or negligence on their part, from availing themselves of. The appellees are about to enforce this judgment. Has the Federal Court, sitting in equity, the juris-

diction to prevent them from so doing? Fraud, accident and mistake are three great heads of equity jurisprudence; and, whenever injustice or wrong, irremediable at law, is about to result from either, power is vested in, and the duty is imposed upon, the Courts of equity to prevent the threatened injury. Their jurisdiction rests upon the fact, that unless they act, wrong will be perpetrated which cannot be remedied; and the bills exhibited to them are appeals to the consciences of the chancellors to prevent injustice. Counsel for the appellees concede that the Federal Courts have equitable jurisdiction to enjoin the enforcement of unconscionable judgments at law which have been procured by fraud; but they insist that they are without power to restrain the collection of those which are secured by accident or mistake. But the foundation of equity jurisdiction is the wrong that will be perpetrated if the Court of equity does not act. Accident and mistakes are as well established grounds for the action of a Court of equity as fraud. It is as unjust—as abhorrent to the conscience of the chancellor—that one who does not owe a judgment which has been secured against him by accident should be compelled to pay it, as it is that he should be compelled to pay one procured by fraud. The injury is the same in each case. Both cases fall under equally well recognized heads of equity jurisdiction. Both appeal with equal force to the conscience of the chancellor, and the conclusion is irresistible that each is entitled to command the same measure of equitable relief. The Federal Courts, sitting in equity, have the same power to prevent the enforcement of unjust judgments at law, procured by accident or mistake,

that they have to prevent the collection of those obtained by fraud. They have plenary jurisdiction restraining the enforcement of judgments and decrees to which the defendants have meritorious defenses, that they were prevented from interposing, either by fraud or accident or mistake, unmixed with their own negligence." (Page 598.)

"This brief review of the cases cited by appellees will suffice to show that their careful reading will demonstrate—that they contain no decision that the Federal Circuit Court may not lawfully enjoin the enforceemnt of an unconscionable judgment or decree of a State Court based upon an unfounded claim, which the defendant was prevented, by unavoidable accident from defeating. More than this; they evidence this undubitable principle, which has now become so firmly established by repeated decisions of the Supreme Court, that it is no longer debatable: 'A Federal, Circuit Court sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a State or of a National Court for new causes, such as fraud, accident or mistake, which prevented the judgment defendants from availing themselves of a meritorious defense that was not fairly presented to the Court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the Courts which rendered the judgments or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other Courts, of which the Federal Courts cannot escape jurisdiction if they arise

between citizens of different States, and involve the requisite amount." (Page 600.)

"The Constitution of the United States and the Acts of Congress have conferred upon the Federal Circuit Courts, the jurisdiction to hear and determine controversies between citizens of different States in which the matter in dispute exceeds $2,000 in value. This suit presents such a controversy. It is a new controversy, which has never been presented to, or decided by, the State Court which rendered the judgment, the enforcement of which the complainants seek to prevent. It involves the question whether or not the appellants were prevented, by unavoidable accident, from availing themselves of a good defense to the claim on which that judgment was based, and, if so, whether or not, the judgment plaintiff should be permitted to collect the judgment. The Circuit Court of the United States has jurisdiction of this controversy, and the appellants have the legal rights to a hearing and decision of the questions which it presents, and to the relief which the decision of those questions entitles them. That Court may not lawfully renounce that jurisdiction. It cannot rightfully deny to the appellants the right to the decisions, decree and writ to which they show themselves entitled. **It is not the judgment of the State Court against which these appellants leveled the injunction they seek. It is against the plaintiff in that judgment.** It is against the unconscionable use by that plaintiff of the judgment which he has recovered to perpetrate an unconscionable wrong. The basis of the suit is the threatened use of this judgment to extort from the appellants money which they ought not to be required to pay, and the Federal

Circuit Court is vested with the same power and charged with the same duty to enjoin the appellees from perpetrating this extortion by means of an unconscionable judgment of a State Court that it is to prevent them from effecting it by use of such a judgment of a National Court, by means of a fraudulent patent, deed, mortgage or by the use of any other instrument or device against which they have no remedy at law. The extortion of $7,842, from the appellants by the use of this judgment of the State Court will inflict upon them as grevious an injury as would its extortion by a like judgment of a National Court, and the Circuit Court of the United States has the same preventive power, and the appellants are entitled to the same measure of relief from it, in the one case as in the other. **The decisions of the Supreme Court which have been cited, however, have so conclusively disposed of this question that more extended discussion would be unprofitable; and we leave it with this brief statement of the reasons which have** induced, and which amply sustain, the rule that the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment, plaintiff from enforcing an unconscionable judgment of a State Court, which has been procured by fraud, accident or mistake, that they have to restrain him from collecting a like judgment of a Federal Court." (Page 602.)

High on Injunctions, 4th Ed. Paragraph 209:

"Where a foreign corporation was required as a condition to doing business in the State to designate a State officer as an attorney to receive service of process, the failure of such officer to

notify the corporation as required by law of the service of the summons in a pending action is sufficient ground for enjoining a judgment subsequently rendered by default. In such case the negligence of the State official in failing to notify the corporation is not attributable to the latter since it has no choice in the matter as to his selection.

In **Marine Insurance Company of Alexandria vs. Hodgson, 7 Cranch, 332,** the Court said:

> "Without attempting to draw any precise line to which Courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any facts which clearly proves it to be against conscience to execute a judgement, and of which the injured party could not have availed himself in a Court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fraud or negligence in himself or his agents, will justify an application to a Court of Chancery."

In **Williamson vs. Berry, 8 Howard 543,** the Court held:

> "The operation of every judgment depends upon the jurisdiction of the Court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And, whenever the right to property is claimed to have been changed under a judgment or decree by a Court, and it is set up as a defense in another Court, the jurisdiction

> what value would that right be if the Court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress; The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this Court, and overruled. **We have repeatedly held: that the jurisdiction of the Courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their Courts,** or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their Courts, it is not so with equitable. The equity jurisdiction conferred upon the Federal Court is the same that the High Court of Chancery in England possesses — is subject to neither intimidation nor restraint by State Legislation, and is uniform throughout the different States of the Union." (Page 430.)

United States District Judge Parlange pointed out in his opinion, **supra,** at p. 18 **(see Rec., p. 86)** that Simon's counsel had conceded at the bar that the injunctive relief sought by complainant herein could have been obtained by it by a suit brought in the State Court. Such a suit would have been a new suit for that purpose. And Judge Parlange rightfully concludes that if that were so, then there was no reason why in this case where diverse citizenship existed and the amount involved exceeded $3000.00, the complainant should not be entitled

to that same relief in the Federal Courts. The foregoing decisions make it quite plain that no State statute could deprive complainant of that right. An admission somewhat similar to that alluded to by Judge Parlange is contained on page 57 of defendant's brief in this Court. He there states that defendant could have instituted in the State Court a separate action coupled with an injunction restraining defendant from executing his judgment on the ground that same was null for want of citation. If this be so, and it is so, no good reason appears why complainant being a citizen of a different State could not bring that new and separate suit and seek injunctive relief in the Federal Court.

Thompson vs. Whitman, 18 Wallace, 457, held:

> "Neither the constitutional provision—that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State—nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered." (Page 457.)
>
> "Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his commentaries. 'The doctrine in **Mills vs. Duryea,**' says he, 'is to be taken with the qualifications that, **in all instances, the jurisdiction of the Court rendering the judgment may be inquired into,** and the plea of **nil debet** will allow the defendant to show that the Court had no jurisdiction over his person. It is only when the jurisdiction of the Court in another State is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit.

The Court must have had jurisdiction, not only of the cause, but of the parties, and, in that case, the judgment is final and conclusive." (Page 463.)

In **Gaines vs. Fuentes, et al., 92 U. S., 10,** it was held:

"A suit to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars a suit, in equity; and if, by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its Courts, whatever designation that Court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different States."

In **Arrowsmith vs. Gleason, 129 U. S., 98,** the Court held:

"But it is insisted that the Circuit Court of the United States sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for—namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff cannot be questioned in a Court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is

clearly established by proof it may be assumed that some State Court of superior jurisdiction and equity powers, and having before it all the parties interested might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity as administered in the Courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such Courts."

See also, **94 U. S., 652, Cirn vs. Hardley; 17 How., 443, Hendrickson vs. Hinckley; 139 U. S., 139, Guaranty Trust Co. vs. Green.**

In **Old Wayne Life Association vs. McDonough, 204 U. S. 15**, it was held:

"The plaintiff in error insists that the Pennsylvania Court had no jurisdiction to proceed against it; consequently, the judgment rendered was void for the want of the due process of law required by the Fourteenth Amendment. If the defendant has no such actual, legal notice of the Pennsylvania suit, as would bring it into Court, or if it did not voluntarily appear therein by an authorized representative, then, the Pennsylvania Court was without jurisdiction, and the conclusion just stated, would follow, even if the judgment would be deemed conclusive in the Courts of that Commonwealth. The constitutional requirement, that full faith and credit shall be given in each

State to the public acts, records and judicial proceedings of every other State, is necessarily to be interpreted in connection with other provisions of the Constitution, and, therefore, no State can obtain, in the tribunals of other jurisdictions, full faith and credit for its judicial proceedings, if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of a Court is due process of law if rendered without jurisdiction in the Court, or without notice to the party.' **(Scott vs. McNeal, 154 U. S. 34, 46).** No State can by any tribunal or representative, render nugatory a provision of the supreme law. **And, if the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another Government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgment has jurisdiction to render** it. Such is the settled doctrine of the Court." (Page 15.)

II b.

THE UNITED STATES CIRCUIT COURT HAS JURISDICTION IN A SUIT BETWEEN THE PARTIES IN INTEREST, CITIZENS OF DIFFERENT STATES, CLAIMING THAT THE JUDGMENT OBTAINED BY ONE VS. THE OTHER IS VOIDABLE FOR FRAUD PRACTICED IN OBTAINING IT.

In **Johnson v. Waters, 111 U. S., 667,** the Court held:

"The administration of General Morgan's succession undoutedly properly belonged to the Probate Court of the Parish of Carroll, and, in a gen-

eral sense, it is true that the decisions of that Court, in the matter of the succession, are conclusive and binding, especially upon those who are parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of the fraud. The Court of Chancery is always open to hear complaints against it, whether committed in pais or in or by means of judicial proceedings. In such cases the **Court does not act as a Court of review,** nor does it inquire into any irregularities or errors of proceedings in another Court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any equitable advantage which they have derived under it." (Page 667.)

"Had the question of fraud been before the Probate Court in any of the proceedings, and had the complainant been apprised of them, the case might have been different. This Court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had no opportunity to litigate in the probate proceedings. But one of the grounds of complainant made by the bill is that the very attorneys whom he had employed to secure his claim acted as attorneys of the succession and heirs and conducted the proceedings for the sale, and participated as active parties therein, without giving him any notice of what was being done." (Page 669.)

In **Cole v. Cunningham, 133 U. S., 112,** this Court referring to the constitutional provision that full faith and credit should be given in each State to the public acts, records and judicial proceedings of every other State, said:

> "This does not prevent an inquiry into the jurisdiction of the Court in which a judgment is rendered, to pronounce its judgment, nor with the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud."

In **Marshall vs. Holmes, 141, U. S., 596,** the Court held:

> "While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by Courts of law over their judgments, a Court of the United States, sitting in equity, will not assume to control such judgment for the purpose simply of giving a new trial, it is a settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery." (Citing **7 Cranch, 332, 336; 17 Howard, 443, 445; 94 U. S., 652, 653; 104 U. S., 93, 96; 107 U. S., 3, II; 133 U. S., 152; 98 U. S., 61, 65.)**

"But it is contended that it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of the judgments at law, and that Mrs. Marshall could obtain the relief asked, only in the Court in which the judgments at law were rendered. Is it true that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may not, in any case, deprive a party of the benefit of a judgment fraudulently obtained by him in a State Court, the circumstances being such as will authorize relief by the Federal Court, if the judgment has been rendered by it and not by a State Court? * * *"

"This Court held that the jurisdiction of the Circuit Court depended upon the question whether the action to annul the judgment was or was not in its nature a separate suit, or only a supplementary proceeding so connected with the original suit as to form an incident to it, and to substantially a continuation of it. It is said: 'If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Courts could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings of the State Courts, or would have appellate jurisdiction over them in a case where the parties are citizens of different State. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill of equity to set aside a decree for fraud in the

obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in **Gaines vs. Fuentes, 92 U. S., 10**, the case might be within the jurisdiction of the Federal Courts. The distinction between the two classes of cases might be somewhat nice, but it may be affirmed to exist.' • • •

"Referring to the provisions of the Louisiana Code of Practice, authorizing an action to annul a judgment obtained through fraud, forgery, the forging of documents, etc., the Court said that it was not disposed to allow the fact that, by the local law, an action of nullity could only be brought in the Court rendering the judgment, or in the Court to which the judgment was taken by appeal, to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States. If the Court said: 'The State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those Courts.' • • •

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is, none the less, an original, independent suit, because it relates to judgments obtained in the Courts of another jurisdiction. While it cannot require the State Court, itself, to set aside or vacate the judgments in question, it may, as between the parties before it, if the fact justify such relief, adjudge that Mayer shall not enjoy the inequitable advantages obtained, by the judgments. **A decree to that effect would operate directly upon him, and**

would not contravene that provision of the Statute prohibiting a Court of the United States from granting a writ of injunction to stay proceedings in a State Court. 'It would simply take from him the benefit of judgments obtained by fraud.'" (Page 599.)

In **Terrehaute and I. R. Co. vs. Peoria & P. U. R. Co., 82 Federal Reporter, 945,** the Court held:

"The Constitution of the United States (Article 3, Par. 2) provides that the judicial powers of the Courts of the United States shall extend to all cases in law and in equity arising under the Constitution, the laws of the United States, treaties or between citizens of different States. The Statutes of the United States have, ever since the original judiciary act, provided that the Circuit Court shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity arising under the Constitution or laws of the United States, or in which there shall be controversies between citizens of different States. Injunctions to restrain proceedings in a State Court are frequently an incident to a case to which the constitutional and statutory power of the United States Courts is thus extended. An action, for instance, to annul a judgment at law obtained by fraud is a distinct case in equity and can, therefore, be brought within the jurisdiction of the Federal or Circuit Courts if proper diversity of citizenship exists," etc. (Page 945.)

See also, **30 L. R. A., 786, Newman vs. Walters.**

Further citations on this point is made unnecessary for it is conceded by appellant in his brief at p. 36 where he says:

> "although in an appropriate action the Federal Court would have had jurisdiction by virtue of the diversity of citizenship to grant equitable relief from a fraudulently obtained judgment."

III.

ON THE MERITS.

Having thus concluded that the Circuit Court had jurisdiction to enjoin Simon from enforcing his judgment if the same were rendered without citation of defendant and if the same were obtained by fraud, we next inquire:

Was the judgment rendered without citation?

Was it rendered by fraud?

IV.

WAS THE JUDGMENT RENDERED WITHOUT CITATION?

The facts in regard to this matter are as follows:

(A) The prayer of Simon's petition in the State Court is to be found on page 13 of the transcript and reads:

> "Wherefore, * * * petitioner prays that the Southern Railway Company, defendant herein,

be cited to appear and answer hereto, and that, it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon **Hon. John T. Michel, Secretary of State,** said service, so made, to be a service upon the said Southern Railway Company, as provided for in the Act aforesaid," etc.

(B) The citation which issued pursuant to this prayer, is to be found on page 14 of the transcript. It contains the caption of the case and then reads as follows:

"To the Southern Railway Company, **through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans:**

"You are hereby summoned to comply with the demand contained in the petition of which copy accompanies this citation, or deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service thereof.

"Witness the Honorabels **T. C. W. Ellis, Fred D. King, Geo. H. Theard, John St. Paul, W. B. Sommerville,** Judges of the said Court, this second day of December in the year of our Lord 1904.

"(Signed) **L. W. Gunther,** Deputy Clerk."
"Court House opposite Jackson Square."

It is significant that both Simon in drafting his prayer and the Clerk of Court in preparing the citation named

John T. Michel as the man upon whom the service was to be made.

(C) The sheriff's return is on page 15 and reads:

"Sheriff's return on foregoing citation.

"Filed December 6th, 1904.

"Received a certified copy of the within citation and petition on the 3rd day of December, 1904, and on the 3rd day of December, 1904, I served said copies on the within named Southern Railway Company, in the Parish of East Baton Rouge, State of Louisiana, **by personal service on E. J. McGivney, Assistant Secretary of State; John T. Michel, Secretary of State being absent at the time of service.**

"(Signed) **W. J. Milligan, Deputy.**"

The subsequent action taken by the **Assistant Secretary of State** appears from the following letter from him which is to be found in the transcirpt at page 18:

"Baton Rouge, January 28th, 1905.

"Mr. Harry H. Hall,
"P. O. Box 444, New Orleans, La.

"Dear Sir:

"Replying to yours of the 27th inst., I beg to say that acting under the instructions of the Attorney General we simply filed the copy of citation and petition made on us in the case of **'Ephraim Simon versus the Southern Railway Company, No. 74,869,** Civil District Court, Parish of Orleans; the said Company having failed to

designate an agent upon whom service of process can be made as required by law.'

"Yours truly,

"(Signed) **Eugene J. McGivney,**
"Assistant Secretary of State."

The statement was made at the oral argument of this case in the Circuit Court of Appeals that the foregoing letter which conclusively shows that the Southern Railway had no notice or knowledge of the suit in the State Court, was not offered in evidence in the present suit. This statement is contradicted by the transcript at page 197 as follows:

Page 197:

"By Mr. Hall: I offer in evidence • • • a letter from the Assistant Secretary of State, January 28th, 1905, marked 'Exhibit B.'"

No objection, whatever, was made to this letter. Had objection been made its writer would have been sworn as a witness. It stands uncontradicted and unchallenged. Since the citation thus filed was the only citation issued, it proves that the Southern Railway Company received no citation in the suit in the State Court. No attempt was made to contradict its assertion, boldly and comprehensively made, that the Assistant Secretary of State did nothing whatever with regard to the citation except simply file it. In the Court of first instance, no claim whatever was made that the Southern Railway ever heard of Simon's suit until after judgment was

rendered. U. S. Judge Foster says in his opinion at p. 297:

> "The evidence in this case shows and it is not disputed that the complainant had no actual notice of the pendency of the action in the State Court until after the final judgment."

In the Circuit Court of Appeals, after the death of Mr. Harry H. Hall, who tried the case below, it was **for the first time** contended that complainant had not proven want of actual notice, and as stated above, the existence of the letter from the Assistant Secretary of State was disputed. When the letter and its introduction were pointed out the matter was apparently dropped. In this Court appellant devotes several pages of his brief to the matter. By way of reply we desire to point out, first, that the letter of the Assistant Secretary of State conclusively proves that the only citation ever issued in the case was never served upon the Southern Railway. It is not suggested, much less proven that the Southern Railway had any other notice of the pendency of the suit. How or when that corporation first received notice is told by Mr. Harry H. Hall in his **sworn** (not unsworn) statement at Tr. p. 188, where he states that he saw a notice in the paper of the rendition of a judgment against the Southern Railway; that he knew that the Southern Railway was not represented in New Orleans and therefore wrote to Col. Henderson, its Assistant General Counsel at Washington, informing him of the judgment, and that Col. Henderson thereupon came to New Orleans and was informed by him (Hall) of

the facts and circumstances surrounding the judgment. That he was thereupon requested by Col. Henderson to file a bill in the U. S. Court to annul and set aside the verdict and judgment rendered in the Civil District Court for the reasons and upon the grounds set forth in the bill herein (Tr. p. 188). That is for the reason among others that the Southern Railway had no notice of the litigation until after the rendition of the judgment. In addition to this the bill avers that Simon's suit was filed "surreptiously and without the knowledge of" the Southern Railway. The bill is verified in the only way that the bill of a corporation can be verified, by affidavit of an executive officer who swears that the allegations are true to the best of his knowledge and belief.

In view of all this, it is indeed late for appellant to come before this tribunal and to suggest that the Southern Railway had any notice of the suit.

Moreover, the question whether the Southern Railway did or did not have notice of the suit is a question of fact. Judge Foster (Tr. p. 297) found it had no such notice. This finding was affirmed by the Circuit Court of Appeals. (Tr. p. 310). This Court has repeatedly held that it will not, except in clear cases, disturb a finding of facts concurred in by both inferior Courts. **Gilson vs. U. S,. 234, U. S. 380; T. & P. Ry. Co. vs. La. R.R. Commission, 232 U. S. 338.**

(E) Louisiana Act 54 of 1905 is quoted by Judge Foster in his opinion (Tr., p. 296) by the Circuit Court of Appeals at transcript page 311. It reads as follows:

> **"Section 1—Be it enacted by the General Assembly of the State of Louisiana, That it shall be**

the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

"Section 2—Be it further enacted, etc., That whenever any such corporation shall do any business of any nature in this State without having complied with the requirements of Section 1 (One) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

It appears, as shown above, that the Southern Railway Company had no knowledge, whatever, of Simon's suit until after the judgment was rendered and, therefore, had no opportunity of any kind to defend itself. Under the foregoing undisputed facts, three questions present themselves:

A. Was Act 54 of 1904 which provides for service on the Secretary of State complied with by the service on the Assistant Secretary of State?

B. Was the Southern Railway Company doing business in the State of Louisiana in such a sense as to be subject to process in that State?

C. Does Act 54 of 1904 constitute due process of law if it means that citation can be served on the Assistant

Secretary of State and by him destroyed or pigeonholed so that the defendant corporation is never apprised of the existence of the suit against it.

IV a.

WAS ACT 54 OF 1904 COMPLIED WITH?

The Circuit Court of Appeals found that Act 54 of 1904 was not complied with. Its decision is as follows (Tr., p. 310):

> "3. As to the service of process and validity of the judgment rendered by the State Court against the appellee.
>
> "A copy of the citation was served upon the Assistant Secretary of State who simply deposited it among the files of his office. The appellee had no notice of the suit. Judgment by default was taken and damages were assessed by the jury. Was the service sufficient? The pertinent act of the Legislature of Louisiana, reads as follows:
>
> " 'Section 1. Be it enacted by the General Assembly of the State of Louisiana, That it shall be the duty of evrey foreign corporation doing any business in this State, to file in the office of the Secretary of State, a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.
>
> " 'Section 2. Be it further enacted, etc., That whenever any such corporation shall do any busi-

ness of any nature, whatever, in this State without having complied with the requirements of Section 1 (One) of this Act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served.'

"Session Acts 1904, pages 133-4.

"Prior to filing the suit in the State Court, the appellee had not named an agent upon whom process might be served, and, as before stated, service was had upon the Assistant Secretary of State. We are of the opinion that service upon the Assistant was not the equivalent of service upon the Secretary of State. It is the fundamental principal of our jurisprudence that a person, whether artificial or natural, must have the opportunity of a hearing before being condemned. 'It is' said the Supreme Court; a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered.' Galpin vs. Wall. 18, Wall 368-9. See also, **Pennoyer vs. Neff, 95 U. S., 714; Scott vs. McNeal, 154 U. S., 34**)

"The method of service, indicated by the Statute, was not pursued in this case, and, employing the language of the Supreme Court, 'the cases are numerous which decide that where a particular method of serving process is pointed out by

Statute, that method must be followed, and the rule is especially exacting in reference to corporations.' **(Amy vs. Watertown, 130 U. S., 316, 317;** citing numerous authorities.) And in the same case, at pages 317, 318 of **130 U. S.**, the Court quotes approvingly, the following language of the Supreme Court of Wisconsin, used by the latter in the **City of Watertown vs. Robinson, 69 Wis., 233, 236, 237:**

" 'When the Statute prescribes a particular mode of service, that mode must be followed. **Ita lex scripta est.** There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this Court to require further citations. • • • When the Statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be had excludes all others. The temporary inconvenience arising from a vacancy in the office of Mayor, affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the Statute.'

' The service of the citation upon the Assistant Secretary of State, was not a compliance with the requirements of Act 54 of the Legislature of Louisiana, and such service was, therefore, unavailing to bring the appellee into Court. Since then, there was neither valid service of process nor voluntary appearance on the part of the appellee, the judgment by default was void for the want of jurisdiction of the person.

"The conclusion reached by the Court renders it unnecessary to call in question, the constitutionality of Act 54 quoted above. But see **Gouner vs. Missouri Valley Bridge & Iron Co., 123 La., 964.**"

Hon. Charles F. Buck, Special Master, discussed this question on pages 162, 163, 164, 165 of the transcript as follows:

"First: Is it, judicially speaking, right to assume the process served on the Assistant Secretary of State, is process served on the Secretary of State?

"I have been unable to find guidance or authority on the point.

"Sec. 2 of Act of 1904 (Act 54, page 134) provides in this regard * * * 'And service of process in such suit may be made upon the Secretary of State the same and with the same validity, as if such corporation had been personally served.'

"The Statute imposes no duty on the Secretary and to say that a manifest duty suggests itself, would be to legislate something into it, which is not there. The Statute makes possible a violation of a fundamental principle briefly and beautifully stated by Mr. Justice Field in **St. Clair vs. Cox, 105 U. S., 356,** a case involving similar issues. Speaking of the right of the State to provide by special legislation the conditions, in which 'foreign Corporation' may be served with process, he says:

" 'Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it.'

"A Statute which provides a substituted service of process through a public officer, without im-

posing any duty in regard to it, comes perilously near to an encroachment of that principle:—the Statute and action under it must at least run the gauntlet of strict construction.

"Who or what is the Assistant Secretary of State? He is not elected by the people nor appointed by the Governor. He is an aid to the Secretary of State, who has authority or option "to appoint an assistant who shall be known as Assistant Secretary of State." (Here there is a break in the Art. of the Constitution (Art. 79) it proceeds **Sic** "or in case of his disability to act under the directions of the Secretary of State shall have authority to perform all the acts and duties of the Office of Secretary of State."

"This from Art. 79 of the Constitution of 1898. In 1904 the Statute in question is enacted and it requires service on the 'Secretary of State;' not in the office of the Secretary nor on the Assistant, if he should have one nor on any representative.

"The service does not show even that it was made at the office of the Secretary; it was made (quoting)'on the within named Southern Railway Company, in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Assistant Secretary of State, John T. Michel, Secretary of State, being absent at the time of service.'

N. B.—It should be noted that the copy of Art. 79 of the Constitution added as an appendix to appellant's brief, is incorrect as it adds in that article the vital words, "and in the absence of the Secretary of State," correcting the hiatus noted by the master.

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5

"This 'Assistant' is appointed at the option of the Secretary and may be removed at pleasure.

"He is nowhere designated as an officer of the State and there is no provision requiring him to take an oath. His salary is payable out of an appropriation of twenty-five hundred dollars authorized for 'clerical expenses' of the Secretary of State.

"Manifestly under the terms of the Articles of the Constitution, he is a mere clerical Assistant to the Secretary with authority to perform such official acts as the Secretary deems proper to 'direct' him to perform and to act for him because of 'disability.'

"There is no proof that the Secretary of State delegated the important duty of receiving 'process to bring foreign corporations into Court, to his Assistant.—Clearly there can be no legal presumption that he had done so.

"Mere 'absence' of the Secretary 'at the time' does not vest authority in a clerk of the office.

"If the Secretary's absence were permanent, the Governor would appoint the successor:—the Assistant Secretary (?) has no existence as a State Officer and can only do things the Secretary requires or 'directs' him to do. He is in no sense his official representative, except in case of the Secretary's disability.

"To hold therefore that process served on such a person is service on the Secretary of State—would be to hold that it would be a good service to leave the papers (process) at the office of the Secretary of State, through any person connected with it convenient at the time.

"Such a construction is at once repugnant to common sense and common justice.

"True, the law in terms imposes non (no) duty on the Secretary of State, in regard to the process served on him, and it might be argued, such being the case, that the result is in either event the same.

"Secretary of State might say for argument sake he would have done no more and no less than he did do—nothing.

"But that does not answer the point, the fact remains the Statute requires service on him; it is a special Statute intended to produce a special and extraordinary effect—and there can be no escape from the conclusion that to produce the intended effect, it must be literally complied with.

"The service must be on the Secretary of State, or there is no service.

"Without therefore passing on the question whether a Statute providing for substituted service, which requires no notice of any kind to the party to be affected, is constitutional or due process of law,—I conclude that service of process in the case of **Ephraim Simon vs. the Southern Railway Company** on E. J. McGivney, Assistant Secretary of State, is not the service required by Section 2 of Act No. 54 of the Acts of 1904, on which a personal judgment could be rendered and said judgment is therefore null for want of legal and valid citation.

"That the rule of strict construction applies, see **Otis vs. Boswell, 9 How. 350; Harris vs. Hardeman, 14 How., 345; Galpin vs. Page, 18 Wall., 369.**

"Since writing the foregoing, I am referred to Sect. 3523 of the R. S. defining the powers and duties of the Assistant Secretary of State.

"Under this Statute he is authorized to perform all, or any of the duties or official acts required

by law of the Secretary of State 'during the sickness or absence for any cause' of the latter.

"I do not think that part of the Statute, obliging him to perform 'such duties pertaining to the office as may be required of him by the Secretary,' need be considered. It manifestly refers to the routine work of the office and is independent of that function which makes him the 'official' in the case 'of sickness or absence' of the Secretary.

"This language is very broad; the effect to be given depends on the scope of the word 'absence;' if it means that the Assistant becomes vested with official function for the moment, when the Secretary may be out of the office—then all the above logic and conclusion fall to the ground; if it means absence absolute for the time being, so that in effect the Assistant becomes **pro tempore** Secretary of State—something more should appear than the declaration of the officer, making the service that the Secretary was 'absent at the time.'

"Sect. 3523 refers to an oath to be taken, as required by the Constitution. The Constitution of '98 contains no requirement in that regard. Besides where this Section and the Constitution of 1898 conflict the latter prevails.

"It is claimed that the point is not made in the pleadings by the complainant. The issue as to the validity of a constructive citation; and it seems to be that matter apearing on the face of the papers can and should be considered.—It is also claimed by complainant that the Act (54) is unconstitutional.

"However, the Master concedes that the terms of the Statute raise a serious doubt as to the correctness of the conclusion stated, but having (having) dealt with the question, let the matter

stand as it is, for the Court to act on its own good judgment."

That the Circuit Court of Appeals' and Special Master's view that service on the Assistant Secretary of State was not service on the Secretary of State within the meaning of the Statute, was the correct view, is shown by the following authorities:

17 L. R. A., 352, Lonkey vs. Keyes Silver Mining Co.:

"The attorney for the appellant contends 'that the service of process upon the Deputy Secretary of State was not a service upon the Secretary and was not a compliance with the Statute under consideration.' The law in relation to service of process on foreign corporations must receive a strict construction, and the service must be made upon the officer or person mentioned in the Act of the Legislature. The cases are numerous which hold that, where a particular method of serving process is pointed out by the Statute, that method must be followed, and the rule is especially exacting in reference to corporations. Was the service upon A. Helm, Deputy Secretary of State, (the Secretary being absent from State), a compliance with the Act of 1889? **The service upon the deputy was certainly not sufficient,** unless we can disregard the plain reading of the Statute, which says: "If any such company shall fail to appoint such agent, then it shall be lawful to serve such company with any and all legal process by delivering a copy to the Secretary of State.' The Statute does not require the copies to be filed nor does it make them a part of the records of the

> Secretary's office, nor require of that officer the performance of any duty in connection therewith, whatever. It merely, for the time being, makes that particular individual occupying the office of the Secretary of State, the agent of the corporation for the particular purpose of receiving service of all process issued against a foreign corporation, where it has failed to appoint an agent as required by the Act. Sec. 1799, Nev. Gen. Stat., definies the duties of the Deputy Secretary of State during the absence of the Secretary of State to be of a 'ministerial nature, belonging to the office.'"

In the case of **Watertown vs. Robinson, 69 Wis. 233,** the Supreme Court of the State said:

> "When the Statute prescribes a particular mode of service, that mode must be followed. **Ita lex scripta est.** There is no chance to speculate whether some other mode will not answer as well. This has been too often held by Courts to require further citations. When the Statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made, excludes all others. This language was afterwards approved and adopted by the Supreme Court of the United States in the case of **Amy vs. Watertown, 130 U. S. 317, 32 L. Ed. 951, 2 Beach Cor. Par. 859, Tallman vs. B. and O. R. R. 45 Fed. Rep. 156.** In **Chambers vs. King Wrought Iron Bridge Co., 16 Kansas, 276,** the Court said:

'But service of summons on a corporation cannot be made on every person who may, in some remote sense, be styled a clerk of the corporation. It could not be made on a deputy or under clerk. It must be made on the clerk—the principal clerk —of the corporation, if made on a clerk at all. It must be made on a person who holds the office of Clerk or Secretary, although such person might not in fact perform any of the clerical duties for the corporation.' In **Winslow vs. Staten Island R. T. R. Co., 21 N. Y. S. R. 787,** service of summons on the Assistant Treasurer was held to be void 'for the reason that he was not the president or other head of the corporation, the secretary or clerk to the corporation, the cashier or treasurer, or a director or managing agent." See also **Watertown vs. Robinson, 59 Wis. 515; Mariner vs. Waterloo, 75 Wis. 440; Alexandria vs. Fairfax, 95 U. S. 79, 24 L. Ed. 585; Kennedy vs. Hibernia Savings and Loan Society, 38 Cal. 154, Aiken vs. Quartz Rock Maripoza G. Min. Co., 6 Cal. 186; Cloud vs. Pierce City, 86 Mo. 362, Wil Lamette F. C. M. & T. Co. vs. Williams, 1 Or. 112, 113; Scorpion Min. Co. vs. Marsano, 10 Nev. 376; Blanc vs. Paymaster Min. Co. (Cal.) 30 Pac. Rep. 765; Jepson vs. Cable Co., 20 New York Supp. .... Kibbe vs. Benson, 84 U. S. 17; 17 Wall. 627, 21 Law Ed. 742; Reinhard vs. Luigo, 86 Cal. 395.**

"It was not designated by the Legislature that a service of process upon the Deputy Secretary of State should be deemed sufficient to bring a corporation into Court. We are, therefore, compelled to hold that the service in this case gave the Court no jurisdiction of the defendant."

130 U. S. 302 Amy vs. Watertown. In this case, this Court said:

> "When a State Statute prescribes a particular method of serving mesne process, that method must be followed. And this rule is specially exacting in reference to corporations."
>
> "The provisions of the Revised Statutes of Wisconsin, which require service of process generally on cities to be by delivering a copy thereof to the Mayor and the City Clerk and the provisions of the Charter of the City of Watertown which require such service to be made by leaving a copy with the Mayor have been held by the highest Court of the State to be peremptory and to exclude all other officers, and it has been held also that the fact that there is a vacancy in the office of Mayor, does not authorize service to be made upon some other substitute officer. And this Court concurred with that Court in this construction. **(P. 317.)**
>
> "The cases are numerous which decide that where a particular method of serving process is pointed out by Statute, that method must be followed, and the rule is especially exacting in reference to corporations. **Kibbe vs. Benson, 17 Wall. 624; Alexandria vs. Fairfax, 95 U. S. 744; Settlement vs. Sullivan; 97 U. S. 444; Evans vs. Dublin, etc. Railway, 14 M. & W. 142; Walton vs. Universal Salvage Co., 16 M. & W. 438; Brydolf vs. Wolf Carpenter & Co., 32 Iowa 509. Hoen vs. Atlantic & Pacific Railway Co. 64 Mo. 561, Lehigh Valley Ins. Co. vs. Fuller, 81 Penn State 398.** The Courts of Wisconsin strictly adhere to this rule. **Congar vs. Railroad Co. 17 Wis. 477, 485; City of Watertown vs. Robinson, 59 Wis. 513; City of Watertown vs. Robinson, 69 Wis. 230.** The two cases

last cited related to the charter now under consideration. In the first case, service was made upon the City Clerk and upon the Chairman of the Board of Street Commissioners, whilst the Board was in sesion, in the absence of the Mayor, who could not be found after diligent search. The Court, after referring to the provisions of the charter and the Revised Statutes on the subject, say: 'The question as to whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and the general provision require the service to be made upon the Mayor, but no service was made upon that officer as appears by the return of the sheriff. The principle is too elementary to need discussion, that a Court can only acquire jurisdiction of a party, where there is no appearance, by service of process in the manner prescribed by law.' In the last case, (decided in 1877) service was made in the same manner as in the previous one, and the Court say: 'When the Statute prescribes a particular mode of service, that mode must be followed. **Ita lex scripta est.** There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this Court to require further citations. * * * When the Statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. **The temporary inconvenience arising from a vacancy in the office of Mayor affords no good reason for a substitution of some other officer in his place, upon whom ser-**

vice could be made, by unwarrantable construction not comtemplated by the Statute."

135 U. S. 318.

45 Federal Reporter 156. Talman vs. The B. & O. Railway Co.

"Under the Revised Statutes of Ohio, Par. 5044, which provide that process against a Railroad Company may be served upon any regular ticket or freight agent thereof, a return that the services was served upon a ticket agent and general agent of the defendant is defective in not showing that the person served was a regular ticket agent."

See also, 91 U. S., 507, Earle vs. McVeigh.

"Rules permitting substituted service are to be rigidly construed."

136 F., 1004, Gage vs. Trust Co.; 166 Fed. 343, Swarts vs. Christie; 137 Fed., 206; King vs. Davies; 95 U. S., 780, Alexandria vs. Fairfax; 97 U. S., 447, Semmens vs. Sullivan.

We submit that the foregoing facts taken in connection with the law quoted, show conclusively that the requirements of Act 54 of 1904 were not complied with by Simon and that, therefore, his judgment may be said on this ground, to have been secured without citation of the defendant railway company. In his brief in this Court Simon contends that this point was not raised by the pleadings. We have refuted this contention infra Chapter V.

Appelant refers to Article 79 of the Constitution of 1898, to Sec. 3523 of the Revised Statutes and to the decision of the Court in State vs. Clark, 46 An. 1409, as justi-

fying the service on the Assistant Secretary of State. Turning to Article 79 of the Constitution of 1898, we find that it reads in part:

> "Provided, the Secretary of State shall have authority to appoint an Assistant who shall be known as Assistant Secretary of State, or in case of his disability to act or under the directions of the Secretary of State, the Assistant Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State."

Appellant in his brief in this Court at page 79 quotes in article as reading:

> "Provided, the Secretary of State shall have authority to appoint an assistant who shall be known as Assistant Secretary of State, **and in the absence of the Secretary of State,** or in case of his disability to act or under the directions of the Secretary of State the Assistant Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State."

The vital words, "and in the absence of the Secretary of State" are however not in the article as it appears in the Louisiana Constitution. This is important here as the sheriff's return recites that the service was made on E. J. McGivney, Assistant Secretary of State, Jno. T. Michel, Secretary of State, being absent at time of service.

We therefore have the Constitution, the organic law of the State, providing when the assistant may act and confining the right to so act to the case of disability of

the Secretary of State. The organic law therefore by the doctrine **expressio unius exclusio alterius** prohibits the Assistant Secretary from acting in any case save disability of the Secretary. This being so, no statute could give any additional power to the Assistant Secretary without being unconstitutional.

Moreover, as was pointed out by the Special Master Mr. Buck, even should Art. 3523 of the Revised Statutes be permitted to override Art. 79 of the Constitution which we submit cannot be the case, that Article can hardly be said to mean that when the Secretary of State steps momentarily out of his office the Assistant Secretary can act. When it refers to absence it uses that term in the sense of absent from the State, and there is no showing of such an absence made in this case. Nor is this all. The Act 54 of 1904 as is clearly indicated by the authorities quoted, **supra,** is a statute which is to be rigidly construed. It is in derogation of common right. Had the lawmaker so elected he could have provided that the service was to be made in the office of the Secretary of State or on the acting Secretary or on the Secretary or Assistant Secretary of State. But he did not do so; he provided that the service should be made on the "Secretary of State." For the reasons given in the authorities quoted, this language precludes service any other person.

Nor is the **Clark case,** dealing as it does with the purely clerical act of certifying a document, such an act as every deputy clerk of Court and every deputy recorder habitualy performs without question, any authority to the contrary.

IV b.

WAS THE SOUTHERN RAILWAY COMPANY DOING BUSINESS IN LOUISIANA IN SUCH A SENSE AS TO BE SUBJECT TO PROCESS IN THAT STATE?

On this subject, the Special Master ruled as follows. (Tp. 165):

> "On the second point I reach the conclusion that the complainant, the Southern Railway Company, **WAS NOT DOING BUSINESS** in the sense of the Statute under which it is attempted to be brought into Court by the 'constructive' or 'substituted' service through the Secretary of State.
>
> "True, the wording of the Statute is very broad: 'Whenever any such (foreign) corporation shall do any business of any nature whatever in this State * * * it may be sued in any parish of the State where it may do business, etc.'
>
> "But 'any business of any nature whatever' after all can only mean that it is doing business in the State as a corporation—perhaps as the corporation for which it is organized and exists.
>
> "It would lead to the rankest absurdities to take the words literally as meaning that any business transaction whatsoever would hold the corporation as 'doing business' in the State. Suppose, for instance, that the Southern Railway Company had so-called treasury stock for sale and sells some, even through a broker, on a public exchange—would anyone contend that such a transaction would be doing business in the State with the effect of subjecting the company to the jurisdiction of the Courts by process served on the Sec-

retary of State on any cause of action? Or suppose the company places a bond issue on the market and some one buys some of these bonds, in New Orleans, and pays for them here, would such result follow?

"It may be borne in mind that a distinction runs through legislation and jurisprudence between the case, where the foreign corporation comes into Court as a plaintiff, having violated or being charged with violation of a Statute—and where the Statute is intended to bring the corporation in by constructive service of process, as a defendant.

See Cyc. of Law and Procedure, Vol. XIX, 1267, 68.

"The facts relative to the office of Mr. J. C. Andrews, occupying an office in a prominent building in the center of the City, on the windows of which it is advertised in demonstrative and showy signs as the ticket office of the Southern Railway Company and his business of selling passenger tickets, etc., would probably, were the matter new, cause me to hold that the Southern Railway Company was doing business in this State.

"But the purpose and objects and the limit of Mr. Andrews' agency (?) is explained by the evidence bringing the case in that regard squarely within the scope of **Green vs. Chicago & Burlington & Quincy Railway, 205 U. S. 530.**

"The syllabus of that case governs this in every detail; but there is a slight variance as to the manner in which the agent (?) did his business. In that case the agent or ticket seller did not furnish the tickets direct over the connecting routes to that of the defendant Co. He took the money;

produced a ticket over roads west of Philadelphia and gave a 'prepaid order' for a ticket to be given the traveler on arrival in Chicago.

"In the case at bar, the L. & N. R. R. furnish the tickets over their line and connecting lines to Mr. Andrews and he sells them and receives the full price of the ticket. The effect—the actual transaction, is the same.

"This same point is expressly held in **Maxwell vs. Atchison R. Co., 34 Fed. 286,** cited in **205 U. S.** above. It must be stated, however, that in this case the alleged agent had authority only to solicit business, not to sell tickets.

"But in **Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235,** also cited in **205 U. S.,** the facts were stronger against the company than in that case. (See page 236.) I am not unmindful of quite a current of authority which holds that under Statutes providing against doing 'any business' a 'single act of business' if it be in the exercise of the regular business of the corporation falls within such Statutes. But the decisions contra-wise predominate and I will not attempt to reconcile or differentiate them. I base my conclusion on the dictum of **Cyc. of Law and Procedure, 19 p. 1268, No. 3.**

"Solicitor for defendant invokes **Farrior vs. New England Mortgage Ry. Co. (Ala.) 7 S. R. p. 200** and **State vs. Bristol Sav. Bank (Ala.) 18 S. R. 533.**

"The latter of these cases is hardly in point for any purpose. It was an action by the State for a penalty for doing business, and is decided on the Statute which however is not quoted.

"Besides in this as in the case of **7 S. R.,** the 'business' was an act 'full in the course of the

corporation's regular business as an investor of money.' The Court at page 200, No. 3, says:—

" 'The bill alleges that the complainant corporation under its charter and laws of incorporation, had full power and authority to loan money and take mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function as imported by its very name and as admitted by the bill. The prohibition of the Constitution is against doing 'any business in this State without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function is as much prohibited as the doing of a hundred such acts.'

"It suffices to say that in both these cases,—without reference to the distinction where the corporation sues—and where it is sought to hold her on constructive service,—the acts of business done were 'in the exercise of their chief corporate functions.' It would be same as if the S. Railway Co had constructed tracks and run a train over them.

"This leads to the question partly covered by what is included in above—whether the interest of the Southern Railway Company as stockholder in the **TERMINAL COMPANY** given in the statement of facts— brings the company within the Statute as doing business in this State.

"It will be remembered that the Southern Railway Company is owner of one-half of the capital stock of said company with privilege to substitute some one else or enjoy the rights of lessee conjointly with others. that it is an endorser on the bonds of the Terminal Company and finally the profits if any are made over and above operating expenses inure to its benefit because they must be

applied to the payment of interest and redemption of bonds on which the Southern Railway Company is bound as an endorser.

"The company makes no use of its lease; it operates no trains over the tracks for either passenger or freight traffic. Some of its freight cars with through freight come in and are 'belted' over these tracks in connection with trains operated by roads coming into the city.

"Is this 'doing business' in the sense of the Statute? I think not.

"This phase of the case in (is) partly covered by **Earle vs. Chesapeake O. R. Co., 127 Fed. 235,** but more especially by **Peterson vs. Chicago, Rock Island & Pac. Ry., 205 U. S. 390.** Every line of that case is applicable to this and disposes of any contention that the ownership of stock in the Terminal Company is to be considered an act of business in the sense of the Statute.

"The holding of property in ownership or as lessee (especially when not used) is not doing business. **Cyc. of Law and Practice, Vol. 19—1269.**

"Solicitor for defendant refers to Section 1 of Act No. 74 of 1902. It suffices to say that that Section, and the entire act, contemplates leases and operating contracts between railway corporation (corporations), operating lines of railway; besides manifestly only the company actually operating the roads whether as owner or lessee, would be doing business in this State.

"The following additional authorities are submitted for reference.

"That selling tickets is not 'doing business.' **8 Abbott P. R. N. Y. 427.**

"Owning stock in another corporation. **Com. vs. Standard Oil, 101 Pa. State, 119.**"

As stated by the Master, the "doing business" charged consists of three items:

1. Mr. Andrew's office in the St. Charles Hotel.
2. Mr. Graham's office in the Morris Building.
3. The interest in the New Orleans Terminal Co.

We shall now give in detail the facts as to each.

IV b 1.

MR. ANDREWS' OFFICE.

The facts in connection with the operation of that office, are thus tersely stated by Mr. Andrews himself. (Tr. p. 64):

> "**John C. Andrews**, being sworn, says that he is by occupation a ticket agent, selling tickets in the City of New Orleans, that all the tickets sold by him **ARE FURNISHED BY THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY**, and that all of his correspondence and communications concerning the sale of tickets is with the said Louisville and Nashville Railway Company in the City of Louisville.
>
> "That many of said Louisville and Nashville Railroad tickets call for transportation over other lines of railroad and as far as the City of New York.
>
> "That many of the said tickets call for transportation over the lines of the Southern Railway Company, but none of the said lines are reached at a point nearer the City of New Orleans, than the City of Atlanta, in Georgia.

"And affiant says that he has no further and other connection with the said Southern Railway Company except such as incidentally results from the sale of such tickets for transportation outside of and beyond the limits of the State of Louisiana, and that all the persons traveling on transportation thus sold by him are conveyed on trains of the Louisville and Nashville Railroad Company and no other, through and out of this State."

This statement is fully borne out at transcript page 205, by the following testimony of **W. W. Finley**, then President of the Southern Railway Company, who swears:

"It is not a fact that Southern Railway Company maintains for the transaction of its business in the City of New Orleans, two offices, one under the jurisdiction of J. C. Andrews, its authorized representative and agent, for the transaction of its passenger business, and the other under the direction of James B. Graham, its freight agent, for the transaction of its freight business, with authority to issue bills of lading for freight received at this end and to be shipped over its lines and the connecting carriers thereof and to make freight rates for shipment in New Orleans of freight of every character for the Southern Railway Company through its connecting carriers into the City of New Orleans.

"Southern Railway Company does employ the gentlemen named, as stated in my direct examination, **only for the purpose of soliciting traffic, and for the performance of duties in connection with the solicitation of traffic to be routed via the lines**

of the Southern Railway Company. They have no authority whatever to issue and do not issue bills of lading, and they have no authority to make and do not make rates. They have on file and publish rates for the information of the public, but they have nothing to do with the making of them. Their duties are to solicit traffic for Southern Railway Company. They are in the employment of Southern Railway Company and are paid by it for the purpose aforesaid, and Southern Railway Company pays rent for their offices for such use. It is not a fact that no other representative or agent of Southern Railway Company is vested with greater power than the agents named, except for the service of citation, or was in the months of December, 1904, and January, 1905. The authority of the two agents named is limited as above stated to the solicitation of traffic for transportation by Southern Railway Company."

Besides this it is corroborated by the record, pages 244, 251 and 252, and **IS NOWHERE CONTRADICTED.**

In view of this evidence, Mr. Andrews' statement of the nature of his employment may be taken as correctly stating the facts.

IV b 2.

MR. GRAHAM'S OFFICE.

The testimony of the complainant on the subject of this office is that of **W. W. Finley, page 205,** quoted **supra.**

The Court's particular attention is called to his statement, reading:

> "The Southern Railway Company does employ the gentlemen named as stated in my direct examination **only for the purpose of soliciting traffic,** and for the performance of duties in connection with the solicitation of traffic to be routed via the lines of the Southern Railway Co. They have no authority whatever to issue and do not issue bills of lading and they have no authority to make and do not make rates."

As against this, there is nothing in this record except the worthless affidavit of E. Simon, the defendant, which is to be found on page 81 and which reads, in part:

> "Respondent further says that **he is advised and informed** and believes, and **therefore,** avers the fact to be that Graham is the freight soliciting agent of the Southern Railway Co. in the City of New Orleans, representing this company, soliciting business in its behalf, and, at times, entering into contracts in the City of New Orleans on behalf and for account of the said Southern Railway Company."

We have used the word "worthless" above, because the affidavit shows on its face, that it is made, not of personal knowledge but on information and belief. Such an affidavit is worthless as against the direct positive affidavit of Mr. Finley.

Beyond this affidavit, Simon has no testimony in the record, except two letters of Mr. Edward Rightor and Mr. Samuel Trufant (Tr., p. 271), stating that the Southern

Railway Company rented offices in the City of New Orleans. (The soliciting offices of Graham and Andrews.)

Your Honors, therefore, have Mr. Finley's solemn oath against a statement of Simon which he is careful to explain that he makes 'because he is advised, informed and believes.' If he was so informed, where are his informers? They were not called upon to testify in this suit.

It may, therefore, safely be said that this record conclusively shows that Graham's only duties to the Southern Railway Company were the solicitation of business.

Before leaving this subject, however, we desire to scotch a snake.

On page 263, et seq, are to be found several documents purporting to be dray receipts. As printed in the record they appear to have the words Southern R. R. printed upon them, and might, therefore, produce the impression that they were receipts issued by the Southern Railway Co. Nothing could be further from the fact, which is that the words Southern R. R. are simply **ROUTING INSTRUCTIONS NOTED ON THESE DOCUMENTS BY SIMON** in handwriting when same were delivered to another carrier.

IV b 3.

THE INTEREST IN THE TERMINAL COMPANY.

There is no dispute as to the facts in this matter. Let us then state them as tersely as possible.

The New Orleans Terminal Company is a common carrier engaged in interstate commerce. It is a distinct poration, a separate entity from the Southern Railway. It owns and operates certain terminal facilities and tracks at New Orleans. The capital stock of the company was owned at the time of the filing of Simon's suit one-half by the Frisco Railroad, and one-half by the Southern Railway and its bonds were guaranteed by both the Frisco and the Southern.

The reason for the Southern's connection with the Terminal Company and the other facts in connection with the matter are thus stated by Mr. W. W. Finley, (Tr., p .199):

> "The Southern Railway Company is the owner of certain shares of stock of the New Orleans Terminal Company , its interest in which and the resultant interest in the properties owned by the New Orleans Terminal Company, the Southern Railway Company acquired by reason of the development of the City of New Orleans as an important commercial and export point, and in anticipation of the possible extension, at some future day, of the lines of Southern Railway Company into the City of New Orleans.
>
> "Under and by virtue of a joint lease, dated July 1, 1903, for the term of ninety-nine (99) years, New Orleans Terminal Company leased to St. Louis & San Francisco Railroad Company and Southern Railway Company the right to use the terminal facilities and belt railroad and other property of the New Orleans Terminal Company for the purpose of the traffic of the several lessees. The said rights were thus leased to the said lessees with the understanding that the said Terminal

Company might grant to other lesses or rail road companies similar privileges and use, and in consideration of such right to use, and such privileges, said lessees undertook to pay certain sums of money equal to the semi-annual interest on the outstanding bonds of New Orleans Terminal Company and such sums as might be necessary to make good any deficit in the cost of operation of the property of the New Orleans Terminal Company in case the earnings thereof should not suffice to the discharge of said interest and deficit. The lessees were also given the right to nominate a subtenant or sub-tenants to use the railroad and terminal facilities of the New Orleans Terminal Company. **The operations of the New Orleans Terminal Company are conducted solely by it.** In the joint lease of July 1, 1903, above referred to, it is specifically provided that the granting of said rights and privileges shall not be taken in any manner to afford or abridge any of the corporate franchises or powers of the New Orleans Terminal Company and that the operations of its terminal facilities and railroad shall be exclusively under its control.

"St. Louis & San Francisco Railroad Company for a time availed itself of its rights under said lease to use the said terminal facilities and railroad of the New Orleans Terminal Company and operated its trains into New Orleans. The New Orleans and Northeastern Railroad Company uses the properties, and the New Orleans Great Northern Railroad Company uses the passenger terminal for the operation of its passenger trains, **BUT SOUTHERN RAILWAY COMPANY HAS NEVER AVAILED ITSELF OF THE RIGHT TO USE THE SAID TERMINAL FACILITIES**

OR RAILROAD, AND HAS NEVER OPERATED ITS TRAINS OR ANY PORTION OF THEM INTO NEW ORLEANS, NONE OF ITS TRAINS BEING OPERATED TO POINTS NEARER THE CITY OF NEW ORLEANS THAN MERIDIAN, MISS., MOBILE, ALA., AND ATLANTA, GA."

The lease in question is in evidence and provides among other things (Tr., p. 223):

> "After the date hereof the Terminal Co. shall exclusively manage, operate and maintain every feature of the property of the Terminal Company, the common use of which is hereby granted to the lessees."

In this connection, note also the uncontradicted testimony of Mr. Larz A. Jones, a witness placed on the stand by Simon, on page 247, as follows:

> Q. The Southern Railway Company has never had any cars operated on the track of the Terminal Company?
>
> A. No.
>
> Q. You mean none of their own cars, is that what you mean?
>
> A. I mean none of their cars or their business as to the Southern Railway Company. The cars and business of its nominees have been operated over it.

Page 250:

> Q. Now, as a matter of fact, has the Southern Railway Company extended its railroad into the City of New Orleans or operated any of its trains into the City of New Orleans?
>
> A. It has not.

And note on page 248 the same witness' uncontradicted sworn statement that the **TERMINAL PROPERTY WAS NOT OPERATED AT ALL UNTIL 1905**, or one year after the supposed citation in the Simon suit.

IV b 4

TO SUMMARIZE.

The Southern Railway Company is a stockholder in the Terminal Company, a separate corporation, which began business in Louisiana a year after Simon's supposed citation. The Southern Railway Company has leased the right in the future to operate its trains in Louisiana, on a road not yet operative when Simon's supposed citation was served. The Southern Railway Company has never operated its trains, or any portion of them, into New Orleans, none of its trains being operated to points nearer to the City of New Orleans than Meridian, Miss., Mobile, Ala., and Atlanta, Ga. The Southern Railway solicits in Louisiana interstate commerce to be carried on by it in other States.

IV b. 5

LAW. GENERAL.

Is this doing business in the State?

We have little trouble in answering this question, as this Court has passed upon each phase of the situation

above developed and has in each case decided that it does not constitute doing business in the State in such a sense as to subject the foreign corporation to service of process in a personal action.

These decisions have gone back to the Hornbook Law in **Pennoyer vs. Neff, 95 U. S. 714,** have builded up from that recognized foundation stone of jurisprudence and have said in effect.

> "The principle of jurisprudence remains that a corporation cannot, any more than a natural person, be sued in an action in personam in a State within whose limits is has never been found. In such a case if a Court assumes jurisdiction and a personal judgment is rendered against the corporation, it is void for want of jurisdiction, etc.
>
> "This is an elementary principle supported by the decisions of the United States Supreme Court and of all the Courts of the country.
>
> "This distinction is clearly this. If a foreign corporation confines its operations to the State within which it was created, it cannot be sued in a State where it has no office and transacts no business, by serving process upon its president or other officer or agent, when accidentally present within such State.
>
> "Such officer or agent does not represent the corporation, nor carry with him his official or representative character into a State where the corporation has done no business and has not established an office."
>
> 107 Ill. App. 335; 29 Mich. 336 (2 N. W. 698); 77 S. W. 322; 59 Atlantic, 232; 196 U. S. 432; 33 Pac. 756; 141 Pa. State, 463; 31 Atlantic, 640; 290 U. S. 406; 110 Fed.

730; 256 U. S. 518; 106 U. S. 350; 130 Fed. 394; 130 Fed. 134. etc., etc.

"A personal judgment is without any validity if it be rendered by a State Court in an action upon a money demand against a non-resident of the State, who was served by a publication of summons, but upon whom no personal service of process within the State was made, and who did not appear.

98 U. S. 478; 101 U. S. 422; 106 U. S. 353; 107 U. S. 545; 137 U. S. 295; 156 U. S 521; 161 U. S. 646; 173 U. S. 224; 176 U. S. 402; 66 Fed. Rep. 637; 76 Fed. Rep. 211.

"The State having within her territory the property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him; and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. If he has no property within the State, there is nothing upon which her tribunals can adjudicate."

130 U. S. 564; 149 U. S. 209. 53 Fed. Rep. 967; 63 Fed. 785.

"Substituted service by publication or in any other authorized form is sufficient to inform a non-resident of the object of proceedings taken, where property is once brought under the control of the Court by a seizure or some equivalent act; but where the suit is brought to determine his personal rights and obligations; that is where it is merely in personam, such service upon him is ineffectual for any purpose."

98 U. S. 370; 110 U. S. 156; 115 U. S. 149; 134 U. S. 326; 172 U. S. 617; 176 U. S. 405; 49 Fed. Rep. 585; 95 Fed. 762.

"Process from the tribunals of one State cannot run into another State and summon a party there domiciled to respond to proceedings against him; any publication of process or of notice within the State in which the tribunal sits cannot create any greater obligation upon him to appear. Process sent to him out of the State and process published within it, are equally unavailing in proceedings to establish his personal liability."

144 U. S. 544; 147 U. S. 173; 169 U. S. 247; 173 U. S. 203.

"The term 'due process of law' when applied to judicial proceedings, means all cases of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon the subject matter; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or by his voluntary appearance."

101 U. S. 413; 129 U. S. 124; 133 U. S. 112; 148 U. S. 614; 154 U. S. 46; 154 U. S. 480.

Among the many acts not considered as doing business are the following:

"Selling of tickets by a Railroad Company."

Doty vs. R. R. 8 Abbott, Pr. N. Y. 427.

"The owning by a foreign corporation of shares of stock in domestic corporations and of interests in local limited partnerships." **Com. vs. Standard** Oil, 101- Pa. State, 119, "wherein it was held

that the ownership of shares of stock in Pennsylvania corporations and of the interests in Pennsylvania limited partnerships, doing business as aforesaid, and the producers of oil, as aforesaid, did not constitute doing business in that commonwealth, by a corporation chartered in Ohio."

Coming now to the particular facts here in issue, we find the jurisprudence to be as follows:

IV b. 6

LAW.

AGENT TO SOLICIT BUSINESS NOT DOING BUSINESS.

S 30

205 U. S., 230, **Green vs. C. B. & Q. R'y. Co.:**

"A Railroad Company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred, because **it hires an office and employs an agent** for the merely incidental business of solicitation of freight and passenger traffic."

176 Fed., 1010, Fowkes vs. American Motor Co.:

127 Federal, 235, Earl vs. C. & O. Railway Co.:

"Where in an action in a Federal Court, sitting in Pennsylvania, against a foreign corporation, the statement of claim filed when the summons was issued described the defendant as a railway corporation of the State of Virginia, and neither such statement, the summons, the praecipe there-

for, nor the return, recited that the corporation was transacting business in Pennsylvania, a service made on the assistant secretary in Pennsylvania was insufficient to confer jurisdiction of the corporation.

"Defendant, a Virginia railroad company, neither owned nor operated any railroad located in Pennsylvania, and maintained no office in that State, though three directors and its assistant secretary resided there, who may at various times have received and given information indirectly affecting the corporation's business elsewhere. Defendant's cars, both freight and passenger, were transported through Pennsylvania by other railroads for the convenience of passengers and shippers; such railroad, however, paying for the use of the cars, and receiving the freight and passenger rates for that portion of the haul that was done in Pennsylvania. **Defendant was also a member of a Freight Transporting line which maintained an agency in Pennsylvania for the solicitation** of freight to be shipped under through bills of lading, each line receiving a proportionate share of the freight, and each contributing to the expense of the agency; and another railroad company located in Pennsylvania sold coupon tickets in connection with its own tickets, only good over defendant's road, accounting each month to defendant for its proportion of the proceeds. Held, that such facts did not justify a finding that defendant was doing business in Pennsylvana, so as to authorize it o be sued in that State."

At page 240, the Court said:

"The sale of tickets over the defendant's railroad by the Pennsylvania Company in Philadelphia is

only made in connection with the sale of the Pennsylvania Company's own tickets and is largely for the convenience of travelers. If this constitutes the transaction of corporate business in a State, it is possible that every important railroad company in the United States may be sued in this district, and in many other districts as well. Finally to maintain a freight soliciting agency in connection with other transportation companies has been decided not to subject the various companies to suit in the jurisdiction where the agency is maintained. Pennsylvania R. R. Co. vs. Rogers, 44 S. E., 300, 62 L. R. A., 178.

* * * * * * * * *

At page 241 the Court said:

"As was said in St. Louis Ins. Co. vs. R. R. Co. 104 U. S., 146:

" 'The arrangement in question was one simply for the convenience both of the shipper and the carrier.' and the Court decided that such an agreement does not make the companies partners."

34 Federal 286; Maxwell vs. At. & S. F. R. R. Co.

"In an action against a Railway Co. of another State, service of process cannot be made upon a passenger agent whose sole duty is to solicit travel for the defendant road, notwithstanding that he may have been employed to affect a compromsie of plaintiff's claim."

84 Federal 419. Union Associated Press vs. Times Star Co.

"A salaried agent of a non-resident newspaper corporation, empowered to solicit advertisements,

make contracts therefor, and receive payment, who carries on the business at an office having the name of the newspaper on its windows, is not a managing agent, through whom the corporation may be served under Code Cov. Proc. N. Y. Par. 432."

113 Federal 506, Weller vs. Pennsylvania R. R. Co.

"If I am mistaken in that, there are decisions made under the Act of 1887 which appear to me to be satisfactory, and they are to the effect that under that act an agent to solicit business within the district is not a representative of the corporation in the sense that he may receive service of process in the district. The cases are **N. K. Fairbanks & Co. vs. Cincinnati, N. O. & T. P. R'y Co., 4 C. C. A. 403, 54 Fed. 421, 38 L. R. A. 271,** which was folowed in **Wall vs. Railway, 37 C. C. A. 129, 95 Fed. 399.** These are decisions of the Circuit Court of Appeals of the Seventh Circuit. There is a Circuit Court decision to the same effect of earlier date. **Maxwell vs. R. R. Co., 34 Fed. 286.** In these cases, and in all, I think, that I have examined, the question considered was as to the character of the agent and the scope of his authority. Under the Act of Congress the question is whether the defendant has a regular established place of business without reference to the character of the agent who may be in charge. The question of the business done in the place, which may be regular and established, of course, is somewhat dependent upon the scope of authority of the man in charge of it, but not wholly so. A solicitor of business may not have an office at all. He may not need an office. Ordinarily, drummers of mer-

cantile houses do not have offices, and they are solicitors of business. Probably in the case of railroad companies, the maintenance of an office is more a matter of advertising than anything else. The company desires to be known to the public as one which is engaged in eastern States in the transportation business. Therefore, it sets up offices in various cities and towns of the country. But this is not significant of its intention to do business in a regular and established place in all of the cities and towns in which it may set up such offices."

215 U. S., 442, Mechanical Appliance Co. v. Castleman:

"In the Federal jurisdiction a foreign corporation can be served with process, under a State Statute, only when it is doing business therein."

Goldey v. The Morning News Co., 156 U. S., 518:

"Notwithstanding the Conformity Act, Par. 914, R. S., decisions and Statutes of other States are not conclusive upon Federal Courts in determining questions of jurisdiction. Even if by the law of the State the sheriff's return is conclusive and can not be attacked after removal into the Federal Court, that Court can determine whether the defendant was properly served; and if, as in this case, it appears that the corporation was not doing business in the State, the Court should dismiss the bill for want of jurisdiction for proper service." (Page 442.)

"In view of the principles thus determined, we think that the return of the sheriff in the State

Court was not conclusive upon the question of service. For, when the question was raised in the Circuit Court of the United States the jurisdiction of the Court would fall if it appeared that the corporation attempted to be served was not doing business in the State of Missouri and the attempted service was not upon one of its agents. **Conley vs. Matthison, 190 U. S., 406; St. Clair vs. Cox, 106 U. S., 350; Peterson vs. Chicago Rock Island & Pac. Railway, 205 U. S., 364; Green vs. C. B. & Q. Ry., 205 U. S., 530.**" (Page 443)

"Moreover, in cases which concern the jurisdiction of the Federal Courts notwithstanding the so-called Conformity Act, R. S., 914, **neither the Statutes of the States, nor the decisions of its Courts** are conclusive upon the Federal Courts. The ultimate determination of such questions of jurisdiction is for this Court alone. **Western Loan & Savings Co. vs. Mining Co., 210 U. S., 368, 369; Mexican Central Ry. Co. vs. Pinkney, 149 U. S., 194.**"

Allen vs. Yellowstone Park Transportation Co., 154 Fed., 507:

"Taking the whole record into consideration, it appears that the Chicago, Burlington & Quincy Railway Company sold tickets over its own line to the Yellowstone Park and then had coupons attached to those tickets that enabled the passengers to take a bus in the Yellowstone Park and go over the lines of the defendant. The real question is as to whether that fact being conceded, and supposing it to have been in the return made by the sheriff, would have been such service upon the

defendant so, as to bring it within the jurisdiction of this Court? **I think not.** In the case of **Green vs. The Chicago, Burlington & Quincy R. R., 205 U. S., 530,** the question here involved would seem to be settled against hte contentin of the plaintiff."

Maguire vs. The Great Northern R. R. Co., 155 Federal 231:

"A railroad company of another State neither owning nor operating a line of road in the State of Iowa cannot be brought within the jurisdiction of a State Court therein either under the rule of the National Acts or the Iowa Statutes relating to suits against foreign corporation by service made upon an employee, not a general agent, maintaining an office in that State for the purpose of soliciting business to be done outside of the State, where the cause of action has no connection with such office or agency."

Geopfert vs. Compagnie Generale Transatlantique, 156 Federal, 198:

"Defendant was a corporation of France, having its principal place of bbusiness in Paris and operating a line of passenger steamers between Havre and New York. It maintained a general agency in New York with a resident agent who represented it in the United States and Canada. It had numerous ticket agents throughout the United States who sold its tickets, among others a company in Philadelphia. Such company maintained offices in the principal cities of the United States

and Europe, and arranged tours and sold tickets over the principal railway and steamship lines of the world. It sold tickets over defendant's line, among others at its Philadelphia office, receiving a commission therefor, and also $600 a year on account of its office rent. It painted the defendant's name on its office door and also the names of other steamship and railway lines. Except for the sale of such tickets, no business was done on behalf of the defendant in the Eastern District of Pennsylvania. Held, that it was not doing business in the district in such sense that a Federal Court there obtained jurisdiction over it by service on the local agent."

West vs. The C. N. O. & T. P. Railway Co., 170 Fed. 355.

The Court quoted the **Burlington case, 205 U. S.**, and said:

"Defendant, an Ohio Railroad corporation, was sued in Georgia, on a transitory cause of action arising in Kentucky. Defendant had no tracks in Georgia and did no business in that State, except that it had a commercial agent, whose duty was to solicit freight and passenger business, without authority to issue bills of lading, sell passenger tickets, or make contracts. Held that defendant was not doing business in Georgia, so that service on such commercial agent would confer jurisdiction over the corporation so far as the Federal Courts were concerned, though the State Courts had decided the contrary." (Page 349.)

IV b. 7

THE OWNERSHIP OF STOCK IN THE TERMINAL COMPANY NOT DOING BUSINESS.

205 U. S. ~~341~~ 364, Peterson vs. C. R. I. & P. R. R. Co.:

The syllabus reads:

> "The ownership by a foreign railway company of a controlling interest in the stock of a domestic railway company which retains its own officers has property of its own and is responsible for its contracts and to persons with whom it deals does not make the foreign corporation liable to service of process within the State on the theory that it is doing business therein through the agency of the domestic corporation."

IV b. 8

LAW.

A SINGLE CONTRACT SUCH AS A SALE OR LEASE NOT DOING BUSINESS.

Hunter vs. The Insurance Co., 218 U. S., 573:

> "A few separate and disconnected transactions by a foreign corporation after its withdrawal from a State, all relating to matters existing before such withdrawal, do not constitute doing business in that State so as to preclude such corporation from revoking the power of attorney to accept process given by it to a State officer as required by Statute

of the State to enable it to enter and do business in the State."

Bruener vs. The Plow Company, 168 Federal 220:

"But there is no evidence in this record that the plaintiff ever did any other act in these territories than to make the sale and delivery of these goods and the attempt to collect their price, and the sale of goods in a State or Territory by a foreign corporation, by means of a solicitor the delivery of the merchandise therein, and the collection of the purchase price, do not constitute doing business or carrying on business within such a State or Territory within the meaning of Statutes prescribing conditions under which foreign corporations may do business therein." Citing ten lines of authorities.)

Metal Company vs. Mining Co., 152 Fed., 1008:

"The transaction of a single act of business in a State by a foreign corporation does not constitute the doing or carrying on of business therein."

See also **158 Fed., 702; 160 Fed., 570; 166 Fed., 342; 176 Fed., 1012; 113 U. S., 727; 47 Fed., 593; 183 Fed., 137.**

19 Cyc., 1268:

"The general conclusion of the Courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one State and citizens of another State, are not a doing or carrying on of business by the foreign corporation within the latter State, even, according to the weight of authority, where

the transaction is of such a character as to constitute a part of the ordinary business of the corporation.

"Illustration of isolated transactions:

" 'For a foreign company to make a purchase of real estate and hold or lease the same.' "

See also **Ib. Note 44**, as follows:

"**Louisville Company vs. Nashville, 84 S. W., 810: 'Purchase of real estate not doing business.'**

"**Wilson vs. Pearce, 85 S. W., 31, (Texas, 1905).**

'Ownership of land by a foreign corporation, leasing same on shares, and assignment of rent not doing business.' "

19 Cyc., 1309:

"Further than this, it is generally held that acquiring the title to real or personal property, and holding or transmitting the same, without more, is not the doing or transacting of business within the meaning of the Statutes imposing conditions or restrictions upon foreign corporations, and is not prohibited by such Statutes."

Quoting numerous cases and especially 95 Texas 252, and **29 Texas Cir. App., 571:**

"**100 Federal, 910, Empire Milling Co. vs. Tombstone**, a single contract made by a corporation owning mining ground in a territory, by which it employs and agrees to pay a second party to exploit and develop the property does not constitute a carrying on of business in the territory by the

corporation within the meaning of the Statute requiring foreign corporations carrying on business within the territory to file copies of their articles of incorporation and providing that every act uone by them prior to the filing thereof, shall be void. And such Statute does not affect the validity of the contract."

Gilchrist vs. Helena H. S. & S. R. Co., 47 Fed., 593:

"**Foreign Corporation's Right to do Business in a State.** Comp. St. Mont. 1888, Sec. 442, p. 720, requiring corporations before doing business in the State, to file in the office of the recorder of the county wherein it intends to carry on business, a copy of its charter, and certain verified statements as to its capital, does not prevent a foreign trust company which has not complied

therewith from purchasing securities of a railroad company in the State, and taking a mortgage upon its property to secure them, since such isolated act is not doing business in the State."

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727:

"A corporation organized under the laws of one State, does not, by doing a single act of business in another State, with no purpose of doing any other acts there, come within the provisions of a Statute of the latter forbidding foreign corporations to carry on business within it, except upon filing certificates showing their place or places of business, their agents and other matters required by the Statute."

See also **139 Fed., 96; 49 An., 390.**

For these reasons we submit, the Southern Railway must be held not to have been doing business in the State of Louisiana at the date of serving the alleged service of citation in 1904.

IV C.

IF ACT 54 OF 1904 AUTHORIZES THE SECRETARY OF STATE TO PLACE THE CITATION RECEIVED BY HIM IN A PIGEONHOLE AND GIVE THE DEFENDANT NO NOTICE OF THE SUIT, DOES IT NOT VIOLATE THE DUE PROCESS OF LAW CLAUSE OF THE CONSTITUTION?

The record shows that the course described in the heading was pursued in this case. The Assistant Secretary of State has stated over his own signature and without contradiction that on receipt of the process he "simply filed it." The judgment in question was rendered without notice or knowledge of any kind being communicated to the defendant. Such a procedure grates harshly upon ones sense of fairness and justice, and it is unthinkable that the constitutional guaranty of due process of law would permit such a hardship. That it does not do so the following language used in the following cases demonstrates:

234 U. S. 394, **Grannis vs. Ordean:**

> "The fundamental requisite of due process of law is the opportunity to be heard. **L. & N. R. R. vs. Schmidt, 117 U. S., 230; Semares vs. Craft, 182**

U. S. 427, and it is to this end, of course, that summons or equivalent notice is employed."

204 U. S., 17, Wayne vs. McDonough:

> "It is a rule as old as the law and never more respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant until he is duly cited to appear and **has been afforded an opportunity to be heard.** Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered.

Gouner vs. The Mo. Valley Bridge & Iron Co., 123 La., 964:

In this case the Supreme Court of Louisiana, was dealing with its own Statute, the Statute here under discussion, to-wit, Act 54 of 1904, and said:

> "This law makes no provision, whatever, for service on the defendant. The officer may decline to communicate with the person sued and give no notice, whatever, not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phraseology of the Statute, the duty of the officer begins and ends in his office. **IF SUCH A JUDGMENT WERE RENDERED IT COULD RECEIVE NO RECOGNITION, WHATEVER, AT THE PLACE OF THE DOMICILE.'**

The Legislature of Louisiana recognized the correctness of the views thus stated and in 1914, by Act No. 267,

Section 26, it repealed Act 54 of 1904 and provided that in cases where service was made on the Secretary of State, it should be his duty

> "to send by registered mail addressed to the corporation at its last known domiciliary post office address, the originals of the papers served upon them, retaining in his office true copies thereof upon which he shall note the date, the manner and other particulars of the service and of the disposition of the originals."

We thus have both the Louisiana Legislature and the Louisiana Supreme Court recognizing the unconstitutionality of Act 54 of 1904.

Scott vs. McNeal, 154 U. S., p. 46:

> "No judgment of a Court is due process of law, if rendered without jurisdiction in the Court or without notice to the party."

Lafayette Ins. Co. vs. French, 18 Howard, 470:

> "A corporation created in Indiana can transact business in Ohio only with the consent, expressed or implied of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose. And these conditions must be deemed valid and effectual for other States and by this Court, provided they are not repugnant to the Constitution or Laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, **or that principle of natural justice which forbids condemnation without opportunity for defense.**"

. Cox, 106 U. S., 356:

St. Cla State permits a foreign corporation to do
s within her limits and at the same time
's that in suits against it for business
bu one, process shall be served upon its agents,
pr vision is to be deemed a condition or per-
the • • • Such condition must not, how-
the ncroach upon that principle of natural
mi which requires notice of a suit to a party
eve he can be bound by it. It must be reason-
jus d the service provided for should be only
bef uch agents as may be properly deemed
abl ntatives of the foreign corporation. The
upo of this matter in **Lafayette Ins. Co. vs.**
rep to which we have already referred, sus-
deci these views."
Fre
tain

ochereau, 17 Wallace, 437. The point here
Lasere vdecided by this Court in **Dean vs. Nelson.**
involved waid:
It was the defendants in the proceeding (meaning
"inal proceedings) the appellee here, were
the the Confederate lines, at the time, and it
withlawful for them to cross those lines. Two
was had been expelled from the Union lines
of thtary authority and were not permitted to
by m The other, Benjamin May, had never left
retur federate lines. **A notice directed to them**
the Cblished in a newspaper, was a mere idle
and They could not lawfully see or obey it.
form hem, the proceeding were wholly void and
As to tive."
inope

211 U. S., 110, Twining vs. New Jersey:

> "Due process of law requires that the Court which assumes to determine the rights of parties shall have jurisdiction." **Pennoyer vs. Neff, 95 U. S., 714; Scott vs. McNeal, 154 U. S., 34; Old Wayne vs. McDonough, 204 U. S., 8.** "And that there shall be notice and opportunity for hearing given the parties. **Harvey vs. Elliott, 167 U. S., 409; Roller vs. Hally, 176 U. S., 398; Lindsey vs. Denver, 210 U. S., 373.**

32 Cyc., 460:

> "In order that jurisdiction may be obtained of a foreign corporation, it must have entered the State in which it is served for the purpose of carrying on its business there. And process must have been served upon an agent sustaining such a relation to it, that notice to the agent may well be deemed notice to the principal without **a violation of the principles of natural justice.**"

19 Cyc., 1328:

> "That principle is twofold, one that the foreign corporation must have entered the domestic State for the purpose of carrying on its business there, and second, that process must have been served upon an agent sustaining such a relation to it, that notice to the agent might well be deemed notice to the principal, **without a violation of the principles of natural justice.**" (Quoting numerous cases.)

On the authority of these decisions we respectfully submit that if the alleged service of process made in this

case was the service contemplated by Louisiana Act 54 of 1904, then Louisiana Act 54 of 1904 is unconstitutional because it contemplates the condemnation of a defendant without a hearing. Such a condemnation would be a denial of due process of law. A judgment rendered under such circumstances could, as the Louisiana Supreme Court has well said "receive no recognition whatever at the place of domicile." A defendant so condemned could legally invoke the jurisdiction of the Federal Court on grounds of diverse citizenship to enjoin his opponent from proceeding to seize his property under such a void judgment.

V.

THE ACCIDENT HAVING BEFALLEN IN ALABAMA AND THE DEFENDANT BEING DOMICILED IN VIRGINIA, THE LOUISIANA COURTS WERE WITHOUT JURISDICTION.

But there is a yet more serious proposition to be submitted. No note has yet been taken of the fact that this suit is brought by a citizen of Louisiana, against a corporation of Virginia, for reparation for injury sustained by breach of contract or a tort committed by that corporation in the State of Alabama.

Of course, even if the defendant in said cause were doing business in Louisiana, which is not the fact, and had an agent here duly authorized to receive service of process, it would not be subject to such suit in the Courts of

service co
not effect. It follows, necessarily, that substituted

In Old W not accomplish what actual service could
the Court

"A yne Mutual Life vs. McDonogh, 204 U. S., 8,
"ted and decided the point as follows:

nor atute of Pennsylvania provides:
it hat no insurance company not of this State,
this agent shall do business in this State, until
cate filed with the Insurance Commissioner of
proc tate a written stipulation, duly authenti-
sura by the company, agreeing that any legal
him s affecting the company, served on the In-
rece ce Commissioner, or the party designated by
hav or the agent specified by the company to
the e service of process for said company, shall
pan the same effect as if served personally on
Stat mpany, within this State, and if such com-
be s should cease to maintain such agent in this
" so designated such process may thereafter
poli rved on the Insurance Commissioner.
Pen n insurance company of Indiana issued a
of t y of insurance upon the life of a citizen of
was sylvania, the beneficiaries being also citizens
pan at commonwealth. The contract of insurance
loca made in Indiana without the insurance com-
Insu having filed the stipulation required by the
was Statute as to service of process upon the
Cou rance Commissioner of Pennsylvania. A suit
Cort brought on the contract in a Pennsylvania
agamissioner, process was served on the State Insurance
on tst the insurance company, and suit brought
pan at judgment in an Indiana Court. The Com-
did some business in Pennsylvania which had

no relation to the contract made in Indiana. Held that:

"'If the defendant had no such actual legal notice of the Pennsylvania suit as would bring it into Court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania Court was without jurisdiction to render a personal judgment against the company.'

"If the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another, Government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgment had jurisdiction to render it.

"Where an insurance company or corporation of one State goes into another State to transact business in defiance of its Statute as to service of process, it will, in an action against it in such State, be held to have assented to the terms prescribed by the local Statute for service of process in respect to business done in that State, but its assent in that regard will not be implied as to business not transacted in that State.

"If a personal judgment be rendered in one State against a corporation of another State bringing such corporation into Court, that is, without any legal notice to the latter of the suit, and without its having appeared therein in person or by attorney, or agent, it is void for want of due process of law. **164 Ind., 321**, reversed."

"The general rule, where it is not changed by Statute, is believed to be that foreign corporations are suable in the domestic tribunal upon any cause of action arising within the domestic jurisdiction and this is so, although the foreign corporation may have been unlawfully transacting business

within the State, since it cannot set up its own wrong in order to defeat the action."

49 Neb., 537; 68 N. W., 929; 3 Duer, N. Y., 648; 49 Fed., 910.

"A foreign corporation cannot be sued in the domestic tribunals, even though it may be doing business and may have appointed an agent in the State to receive service of process, for torts committed in a foreign State."

Central Ry. vs. Carr, 76 Ala., 388; 52 Am. Rep., 339; Robins vs. Oceanic, 112 N. Y., 315; 19 N. E. 625; 16 N. Y. Civ. Pro., 255; (2 L. R. A., 636); Osler vs Buffalo, 130 Fed, 1017.

"Thus it was held in **76 Alabama, 388**, that a passenger injured in his person while traveling in Georgia, on a railroad incorporated only in Georgia, although extended to and doing business in Alabama cannot maintain an action therefor in Alabama."

Newell vs. Great Western, 19 Mich, 336.

So that it is manifest that even if the Southern Railway were doing business in Louisiana, which was not a fact, it could only be sued in that State by substituted process upon causes of action arising out of that business and not such as might result from transactions in another State.

VI.

SIMON'S ASSIGNMENT VI.

This assignment sets up that complainant did not in its bill complain of the mode of service on it and that

therefore the findings of the master and of the Circuit Court of Appeal were **ultra petitionem.**

This statement is Simon pure error.

By turning to page 4 of the transcript at which the original bill is printed, we find a paragraph in that bill reading:

> "And your orator avers that the attempted service of said citation upon the Secretary or Assistant Secretary of State of Louisiana, was not a citation upon your orator, and is absolutely null and void for the purpose of bringing it under the jurisdiction of the said Civil District Court."

The quotation will, we believe, dispose of Assignment VI.

VII.

SIMON'S ASSIGNMENTS VIII, XVI AND XVII.

These assignments raise an old and oft-laid ghost. The burden of their complaint is that since the State Court decided the case it necessarily decided that it had jurisdiction, and that due process of law was allowed, and that decision is not reviewable here.

This Court has, on more than one occasion, pointed out the fallacy of the above contention, notably in the following cases:

234 U. S. 385, Granis vs. Odean:

> "This Court must exercise an independent judgment as to whether the process sanctioned by

the Court of last resort of the State constituted due process of law; it is not bound by nor can it merely accept the decision of the State Court on that question."

204 U. S. 15, Old Wayne Life Ass'n vs. McDonough:

"The plaintiff in error insists that the Pennsylvania Court had no jurisdiction to proceed against it; consequently the judgment it rendered was void for the want of the due process of law required by the Fourteenth Amendment. If the defendant had no such actual, legal notice of the Pennsylvania suit as would bring it into Court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania Court was without jurisdiction, and the conclusion just stated would follow, even if the judgment would be deemed conclusive in the courts of that Commonwealth. The constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial pro- interpreted in connection with other provisions of interpreted in connection with other provisions of the Constitution, and therefore, no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.' **Scott vs. McNeal, 154 U. S., 34, 46.** No State can, by any tribunal or representative, render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another

government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgments had jurisdiction to render it.

"Such is the settled doctrine of this Court. In the leading case of **Thompson vs. Whitman, 18 Wall, 457, 468**, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the Court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one State may be questioned in a collateral proceeding in another State, notwithstanding the averments in the record of the judgment itself. The Court, among other things, said that if it be once conceded that 'the validity of a judgment may be attacked collaterally by evidence showing that the Court had not jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. **IF ANY SUCH STATEMENTS COULD BE USED TO PREVENT INQUIRY, A SLIGHT FORM OF WORDS MIGHT ALWAYS BE ADOPTED SO AS EFFECTUALLY TO NULLIFY THE RIGHT OF SUCH INQUIRY.** Recitals of this kind must be regarded like asservation of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent.' This decision was in harmony with previous decisions. Chief Justice Marshall had long before observed in **Rose vs. Himely, 4 Cranch, 241, 269**, that upon principle the operation of every

judgment must depend upon the power of the court to render judgment. **In Williamson vs. Berry, 8 Howard, 495, 540,** it was said to be well settled that the jurisdiction of any court exercising authority over a subject 'may be inquired into in every other Court when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings,' and that the rule prevails 'whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice of chancery, or the municipal laws of States.' In his Commentaries on the Constitution, Story, referring to **Mills vs. Duryee, 7 Cranch, 481, 484,** and to the constitutional requirement as to the faith and credit to be given to the records and judicial proceedings of a State, said: 'But this does not prevent an inquiry into the jurisdiction of the Court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer (upon the States), a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' In the later case of **Galpin vs. Page, 18 Wall, 350, 365, 366**—decided after, but the same term as **Thompson vs. Whitman**—the Court, after referring to the general rule as to the presumptions of jurisdiction in superior courts of general jurisdiction, said that such presumptions 'only arise with respect to jurisdictional facts concerning which the record is silent.' Presumptions are only indulged to supply the absence of evi-

dence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.' In the same case: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is justly administered.''

"In **Cole vs. Cunningham, 133 U. S., 112,** this Court, referring to the constitutional provision that full faith and credit should be given in each State to the public acts, records and judicial proceedings of every other State, said:

" 'This does not prevent an inquiry into the jurisdiction of the Court, in which a judgment is rendered, to pronounce its judgment, nor with the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud.' "

In Scott vs. McNeal, 154 U. S. 45, it was held:

"Upon a writ of error to review the judgment of a higher Court of a State upon the ground that

the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that Court's construction of a statute of a Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, the Court must decide for itself the true construction of the statute. (**Huntington vs. Attrill, 146 U. S., 657, 683, 684; Mobile and Ohio R. R. vs. Tennessee, 153 U. S., 486, 492, 495**). 'No judgment of a court is due process of law if rendered without jurisdiction in the Court, or without notice to the party.' " (p. 46).

175 F., 669, Michigan Trust Co. vs. Ferry:

"State laws and decisions cannot determine for the National Courts what constitutes sufficient process of law or sufficient appearance of the parties, but it is their duty to exercise their independent judgment in deciding these questions notwithstanding the full faith and credit provision of the Constitution.

VIII.

SIMON'S ASSIGNMENT XIII.

This assignment reads:

"'That the Circuit Court of Appeals erred in maintaining complainant's bill and in perpetuating

the injunction herein, because a Court of Equity, State or Federal, is without power by its writ of injunction to enjoin a judgment of a Court of concurrent jurisdiction merely because said Court differed in its interpretation of a statute of a State; in this case, in the interpretation as to the mode of service of process, namely, whether the service under Act 54 of 1904, of the State of Louisiana, was made upon the Secretary of State, or his assistant, purely a legal question."

This assignment is apparently a typographical or other error.

No question as to whether the service was made upon the Secretary of State or his assistant was ever raised in this case in the State Court. The Sheriff's return on the alleged citation is in the record at page 15, and reads:

> "Received a certified copy of the within citation and petition on the third day of December, 1904, and on the third day of December, 1904, I served said copies on the within named Southern Railway Co., in the Parish of E. Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Asst. Secy. of State, John T. Michel, Secretary of State, being absent at the time of service."
>
> (Signed) W. J. MILLIGAN, Deputy.

There is no other evidence on the subject in the record and it was conceded at the bar of the Circuit Court of Appeals, that the service was made on the Assistant Secretary of State as set forth in the foregoing return.

There is, therefore, no such question here involved as the question whether service was made upon the Secretary of State or his assistant.

IX.

FRAUD.

This record shows that Simon was a passenger on a Southern Railway train on February 8, 1904. What happened to him is thus described by **Dr. E. Denegre Martin** at transcript, page 179:

> Q. On or about March, 1904, do you recall having made a visit to **E. Simon**, the defendant in this case?
>
> A. Yes, sir.
>
> Q. Did you, at that time, make any physical examination of him?
>
> A. Yes, sir; I examined both feet and found a swelling of both ankles.
>
> Q. What was the extent of that swelling?
>
> A. The swelling was not very extensive, simply apparent and showed that the party had sustained some injury.
>
> Q. Did he state to you how he had been injured?
>
> A. His statement to me was that while in a train on the Southern Railway he was sitting on one of the seats with his feet on and against the back of the opposite seat when the car same [came] to a sudden stop and threw him with force forward injuring his ankles.
>
> Q. Did he state what kind of a car he was in whether a sleeping car or a day coach?
>
> A. I don't recall that fact.

Q. It is averred in the original petition by Mr. Simon that the ligaments of his leg were lacerated and torn. Is that true or not?

A. **That was not my finding.**

Q. If that had been the fact, could you have found it?

A. Yes, sir.

Q. As a matter of fact, were the ligaments of his leg lacerated and torn?

A. **They were not and could not have been from the nature of the accident.**

Q. Did you make a subsequent examination after the 4th of March?

A. Yes, sir; I saw him subsequently; I don't remember the exact date. He was then in a fair condition and walked around the store; at that time the injury was not apparent, but he stated that he still suffered from his injuries.

Q. How long was that after the first visit?

A. About two weeks, I think.

Q. Did you again see him later?

A. I don't recall any other visit.

Q. He has averred that his injuries were of a serious nature and sufficient to cripple him. What do you say as to the averment that his injuries were permanent?

A. That was not my opinion at the time nor did I think so from my examination.

Q. Where was Mr. Simon when you made the visit in March, 1904?

A. In his place of business on Chartres Street. I don't remember the number but it was opposite the new Court House.

After the accident, Simon was offered $350.00 in full settlement. His counsel offered to accept $5000.00 in full

settlement. This offer the Southern Railway Company considered absolutely out of the question and declined. The matter was left open for future adjustment.

This record shows that, under the foregoing circumstances, Simon caused a so-called citation to issue and to be served upon the Assistant Secretary of the State of Louisiana (not the Secretary of the State of Louisiana, as required by the statute). That without any inquiry as to whether the defendant had any actual notice of the suit (Tr., p. 30), but being informed that this defendant had made no appearance, he took a default judgment against it for the grossly exaggerated sum of $13,348.00.

That in taking the said judgment he went out of his way to see that no record of the evidence adduced was made, in this respect breaking an invariable custom of the trial court (Tr., p. 66), and that in addition to this, although the case might have been submitted to the judge, it was submitted to a jury (Tr., p. 66).

These actions, as it seems to us, show quite clearly that Simon was undertaking by unfair means amounting to fraud to secure an undue advantage of the absent defendant.

Let us review them:

The special master said on this subject (Tr., p. 173): That the testimony was not reduced to writing may permit criticisms and suspicions, especially when considered in reference to so large a claim, partly made up of items of doubtful right of recovery, but it does not in itself justify a conclusion of wrongdoing.

The depositions of Kennedy, at page 59, show that on March 3rd, 1904, Simon's representative, after discussing a settlement of the claim on a basis of $300.00, left him (Kennedy) with the impression that Simon would make an offer. Simon leaves or creates that impression on the minds of the Southern Railway officials, takes no action from April until December, and then, in December, goes into a Court in a State remote from the domicile of the Southern Railway, a State in which the Southern Railway Company is not doing business, a State in which it has no representative authorized to receive service of process, a State in which it has no reason to believe that a suit will be brought against it, and serves a so-called citation on the Assistant Secretary of State, who, in accordance with standing instructions received by him from the Attorney General of the State, pigeonholes the citation and gives absolutely no notice thereof to the Southern Railway Co.

Before bringing this suit, Simon wrote no letter to the Southern Railway Co., nor to any of its officials, and gave no notice of any kind to them of his intention of bringing a suit. He was evidently aware that they had no notice of the suit. With this information in his possession, instead of attempting to afford them some fair day in Court, he, on the contrary, ordered the testimony which his witnesses gave not transcribed, and in order to be sure to get a judgment for those items in his petition which show on their face that they are gross exaggerations, he impanelled a jury, well knowing the disposition of juries towards corporations, when he might have submitted the matter to a Judge.

He submitted to that jury a petition which contains, as the record shows, at least three false statements, as follows:

First—His petition avers (Tr., p. 12), that the ligaments of his legs were lacerated and torn so as to prevent the use of his limbs in locomotion.

Dr. E. D. Martin, an eminent physician of New Orleans, testified on page 179 of the transcript, without contradiction, as follows:

Q. It is averred in the original petition, by Mr. Simon, that the ligaments of his legs were lacerated and torn. Is that true or not?

A. That was not my finding.

Q. If that had been the fact, could you have found it?

A. Yes, sir.

Q. As a matter of fact, were the ligaments of his legs lacerated and torn?

A. They were not and could not have been from the nature of the accident.

The petition avers (on page 8 of the transcript), that the accident happened on Feb. 8th, 1904.

"That he, petitioner, was confined to his room for a period of two months, receiving constant professional medical attention and treatment."

Schumate and Martin both swear, without contradiction, in this record, that they interviewed Simon in March. Schumate fixes the date as March 3rd., and states that he (Simon) was, at that time, in his store,

attending to his business. The statement in the petition that he was confined to his room for two months is thus shown to be false.

Simon's petition avers that during a period of two months he was prevented from giving his personal attention to his business. The testimony of Dr. Martin and Schumate, above referred to, shows that he was attending to his business within less than thirty days after the alleged accident. How much earlier he began to attend to his business we are left to conjecture, in the absence of any testimony on the subject by Simon himself.

All these facts will, we submit, lead the Court to the inevitable conclusion that Simon deliberately lulled to sleep any suspicion of the Southern Railway Co. of his intent to sue and then proceeded in a far distant and out of the way tribunal to obtain upon false allegations and excessive and entirely unwarranted judgment. Said excessive judgment being obtained solely because the Southern Railway Co. had no knowledge or information of the filing of the suit wherein the judgment was obtained.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
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ALFRED P. THOM,
Of Counsel.

New Orleans, October, 191-

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 34.

EPHRAIM SIMON, APPELLANT,

vs.

SOUTHERN RAILWAY CO., APPELLEE.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REJOINDER OF APPELLEE.

If the court please:

We feel it to be a duty which we owe not only to the court but to ourselves to point out certain of the errors into which the reply brief of appellant has fallen.

"A."

We claim that Simon's injury was inconsiderable (Original Brief, p. 8).

Simon claims that (Reply Brief, p. 9; Rec., p. 12) "your petitioner's ankles were severely sprained and the ligaments of his legs lacerated and torn."

Dr. E. D. Martin, a prominent physician in New Orleans, employed especially to make an examination of Simon, swears (Rec., p. 79):

> "Q. Did you at that time make any physical examination of him (Simon)?
> "A. Yes, sir, I examined both feet and found a swelling of both ankles.
> "Q. What was the extent of the swelling?
> "A. The swelling was not very extensive, simply apparent and showed that the party had sustained some injury. * * *
> "Q. As a matter of fact were the ligaments of his leg lacerated and torn?
> "A. They were not, and could not have been from the nature of the accident."

Nor does Dr. Gaudet, Simon's physician, make any attempt to support the claim made by Simon that "the ligaments of his legs were lacerated and torn." He contents himself (Rec., p. 49) with the vague and general statement that Simon's injuries were serious.

"B."

Simon Originally Claimed $5,000.

This statement is based on the affidavit of Walter Kennedy, which is in evidence at Record page 60, in accordance with the agreement at Record page 243, which reads in part as follows:

> "The said Henry L. Lazarus, after discussing the matter of Simon's claim for injuries as his counsel, made a proposition to me for a settlement of the claim of $5,000. This proposition I rejected stating to him that the railway company would not be willing to consider the settlement of this claim for such an amount."

Dr. E. D. Martin (Rec., p. 181) swore:

> "Q. What was said by either Mr. Kennedy or Judge Lazarus as to the amount of the settlement?
> "A. I do not recall exactly what was said in regard to the settlement but my impression is that Judge Lazarus was willing to accept the settlement of $5,000."

"C."

Failure to Transcribe Testimony Stenographically.

This statement is based on the statement of Mr. Harry H. Hall in the Record, at page 66, which reads:

> "Affiant further deposes and says that the testimony in support of said verdict of said civil district court was, as affiant was informed and verily believes, not reduced to writing by reason (of) which intentional omission no relief could be had by appealing from this judgment to the Supreme Court of Louisiana."

This statement is repeated by Mr. Hall at Record page 188, where he says:

> "The testimony had not been reduced to writing. There was, therefore, no evidence in the record which would justify defendant in taking an appeal. As I stated that the testimony of the witnesses had not been reduced to writing."

Curiously enough in attempting to controvert our claim that by failing to have the testimony taken down stenographically Simon took an unconscionable advantage of his adversary, counsel quotes the following language used by the Supreme Court of Louisiana in Simon *vs.* Howard, 23d La. Ann., 504:

> "We find no evidence in the record. In such a case we will presume that the court *a qua* in rendering judgment proceeded on proper evidence."

Our contention is that Simon had this decision in mind when he failed to have the testimony taken down stenographically.

Simon then proceeds to quote law to the effect that a litigant has a "legal" right to pursue this course. Our contention is that, under the circumstances of this case, the pursuit of such a course, whether legal or illegal, in a strict sense, was taking an unconscionable advantage of the "absent and unrepresented" defendant.

Other Errors in Simon's Brief.

(A.) At page 15 Simon's reply brief states:

> "Andrews, the ticket agent of the Southern Railway Company, sold and delivered tickets, not only over lines connected with the Southern Railway Company, but sold and delivered tickets (independently of connecting carriers) over the independent lines of the Southern Railway Company" (Rec., pp. 206-252).

A reference to the pages quoted will convince Your Honors that this statement is an error. A reference to our original brief at page 72 will give the testimony on the subject which is there quoted at some length.

Mr. Andrews there swears that "All the tickets sold by him are furnished by the Louisville & Nashville R. R. Company," etc.—*i. e.*, are tickets for continuous interstate traffic originating on the L. & N., and in many instances proceeding on to the Southern, but always reaching the Southern at points without the State of Louisiana.

(B.) At page 15 of his reply brief, Simon's counsel refers to Simon's affidavit as showing that Mr. Graham, the soliciting freight agent of the Southern Railway, made contract in the city of New Orleans on behalf of that company. We have already refuted this contention in our original brief, at page 75, and respectfully refer the court thereto.

We are a little surprised, however, to find at page 16 that Simon is contending that the documents copied in the transcript at pages 263 to 269 are claimed to be "bills of lading" of the Southern Railway Company issued in New Orleans. The documents do not in any way resemble a railroad bill of lading, and the only reason we refer to them at all is because as copied in the transcript they appear to have the words "Southern Railway" printed on them. In the circuit court the originals of these documents were on hand, and no confusion arose. In the Circuit Court of Appeals we had the clerk of the circuit court send up for inspection one of the original documents. They are nothing more nor less than dray tickets, on which Simon, by the way of routing instructions, caused the words "Southern Railway" to be placed. Our recollection is—although we are not entirely positive on the point—that the words "Southern Railway" are written in lead pencil, and that the words "Received in good order from E. Simon, manufacturer of ladies' shirts, underwear, and boys' waists, 416 Chartres street, between St. Louis and Conti," are printed. The documents were not issued by the Southern Railway, nor was the signature E. A. Bynum, agent, appended by a representative of the Southern Railway, and no one is more familiar with that fact than Simon. If there be any doubt in this court's mind on the subject, we earnestly urge that the production of the original documents or photographs thereof be ordered. A single glance will reveal their true nature.

(C.) On page 31 of his reply brief, Simon's counsel says:

> "* * * it is admitted by the president of the Southern Railway that Mr. Andrews sells tickets to purchasers in the city of New Orleans for passage not only through connecting carriers, but directly over the lines of the Southern Railway in other States (R., p. 206), and receives money therefor, and places it in bank for account of Southern Railway Company (R., p. 269), and likewise Graham, the freight agent, through Mr. Bynum, issues bills of lading or receipts

for transportation of freight over the lines of the Southern Railway" (R., p. 263, *et seq.*).

As a matter of fact, Mr. W. W. Finley, the president of the Southern Railway, testified to just the reverse. His testimony is to be found on pages 205 and 206 of the record, and reads in part as follows:

> "It is not a fact that the Southern Railway maintains for the transaction of its business in the city of New Orleans two offices, one under the jurisdiction of J. C. Andrews, its authorized representative and agent for the transaction of passenger business, and the other under the direction of James B. Graham, its freight agent for the transaction of its freight business, with authority to issue bills of lading for freight received at this end and to be shipped over its lines and connecting carriers thereof, and to make freight rates for the shipment in New Orleans of freight of every character for the Southern Railway through its connecting carriers into the city of New Orleans.
>
> "Southern Railway does employ the gentleman named as stated in my direct examination only for the purpose of soliciting traffic and for the performance of the duties in connection with the solicitation of traffic to be routed via the lines of the Southern Railway Company. They have no authority whatever to issue and do not issue bills of lading and they have no authority to make and do not make rates. They have on file and publish rates for the information of the public, but they have nothing to do with the making of them."

The check referred to is a check given long after the alleged service of process in this case to Mr. Andrews and shows by its endorsement that it was given as the "price of a ticket N. O. to Washington and N. Y.," *i. e.*, a ticket sold by Andrews in strict accordance with his testimony (Rec., p. 64), being over the L. & N. R. R. to Atlanta and thence to New York, and being furnished him by the L. & N. R. R. Company for that purpose.

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Appellant is between the horns of a dilemma. If he concedes that the unconstitutionality of act 54 of 1904 was set up, his ponderous argument at 35 *et seq.* falls. If he denies that constitutional questions were raised, and if the court agrees with him, then he must go out of court here, as the judgment of the Circuit Court of Appeals would be final.

The Action of Nullity is a Separate, Distinct Suit under Louisiana Law.

The following articles of the Louisiana Code of Practice are in point:

C. P., 604:

One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same, or if the delay for taking same have expired.

C. P., 610:

The party praying for the nullity of a judgment before the court which has rendered the same must bring his action by means of a petition; and the adverse party must be cited to appear as in ordinary suits.

C. P., 611:

Though there has been no appeal within the delay prescribed by law, the nullity of the judgment may yet be demanded by means of an action brought before the court which has rendered the same, within the delay hereafter provided.

C. P., 612:

The nullity of a judgment rendered against a party without his having been cited or by an incompetent judge, even if all the formalities of the law have been observed, may be

demanded at any time, unless the defendant were present in the parish and yet suffered the judgment to be executed without opposing the same.

30 La. Ann., 144, Woolfolk *vs.* Woolfolk:

This was a suit brought in a Louisiana state court to annul a judgment of that court. The suit was styled an intervention and was engrafted onto the old proceedings instead of being instituted as a new and separate suit. The court said:

> "A suit for the nullity of a judgment cannot be brought by way of intervention or third opposition. It must be brought in the ordinary form, by petition and citation."

And the so-called interventions were dismissed as in case of nonsuit.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors for Appellee.

ALFRED P. THOM,
Of Counsel.